(9)

No. 91-2054-CFX Title: United States Department of Justice, et al., Petitioners
Status: GRANTED v.
Vincent James Landano

Docketed:
June 22, 1992 Court: United States Court of Appeals for the Third Circuit

Vide:

Counsel for petitioner: Solicitor General

Counsel for respondent: Mullin,Neil

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Jun 22 1992 | G | Petition for writ of certiorari filed. |
| 2 | Jul 22 1992 | | Brief of respondent Landano in opposition filed. |
| 4 | Aug 31 1992 | | Reply brief of petitioners U.S. Department of Justice, et al. filed. |
| 3 | Sep 2 1992 | | DISTRIBUTED. September 28, 1992 |
| 5 | Oct 5 1992 | | Petition GRANTED. |
| | | | ********** |
| 6 | Nov 3 1992 | | Record filed. |
| | | * | Original proceedings United States District Court, District of New Jersey. |
| 7 | Nov 10 1992 | | Record filed. |
| | | * | Partial proceedings United States Court of Appeals for the Third Circuit. |
| 8 | Nov 19 1992 | | Joint appendix filed. |
| 9 | Nov 19 1992 | | Brief of petitioner filed. |
| 11 | Dec 7 1992 | | Order extending time to file brief of respondent on the merits until January 11, 1993. |
| 12 | Dec 28 1992 | | SET FOR ARGUMENT WEDNESDAY, FEBRUARY 24,1993.(3RD CASE). |
| 13 | Dec 30 1992 | G | Motion of respondent to supplement the record filed. |
| 14 | Jan 11 1993 | | REDISTRIBUTED. January 15, 1993 |
| 15 | Jan 11 1993 | | Brief of respondent Vincent James Landano filed. |
| 17 | Jan 15 1993 | | CIRCULATED. |
| 16 | Jan 19 1993 | | Motion of respondent to supplement the record GRANTED. |
| 18 | Feb 11 1993 | X | Reply brief of petitioner filed. |
| 19 | Feb 24 1993 | | ARGUED. |

Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

91-2054

No.

# In the Supreme Court of the United States

OCTOBER TERM, 1991

---

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

VINCENT JAMES LANDANO

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

KENNETH W. STARR
*Solicitor General*

STUART M. GERSON
*Assistant Attorney General*

JOHN G. ROBERTS, JR.
*Deputy Solicitor General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

LEONARD SCHAITMAN
JOHN F. DALY
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

89

## QUESTION PRESENTED

Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(D), permits the withholding of law enforcement information that "could reasonably be expected to disclose the identity of a confidential source" and, in a criminal investigation, information provided by such a source. The question presented is:

Whether, in light of the confidentiality that is inherent whenever the FBI gathers information during a criminal investigation, Exemption 7(D) protects all sources of such information, in the absence of evidence negating the premise of confidentiality for a particular source.

## PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statutory provision involved | 2 |
| Statement | 2 |
| Reasons for granting the petition | 8 |
| Conclusion | 20 |
| Appendix A | 1a |
| Appendix B | 31a |
| Appendix C | 48a |
| Appendix D | 62a |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Brady* v. *Maryland*, 373 U.S. 83 (1963) | 3 |
| *CIA* v. *Sims*, 471 U.S. 159 (1985) | 18 |
| *Diamond* v. *FBI*, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984) | 8 |
| *Donovan* v. *FBI*, 806 F.2d 55 (2d Cir. 1986) | 8, 13 |
| *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571 (D.C. Cir. 1990) | 8, 9, 16, 17 |
| *Ingle* v. *Department of Justice*, 698 F.2d 259 (6th Cir. 1983) | 8, 12 |
| *Irons* v. *FBI*, 880 F.2d 1446 (1st Cir. 1989) | 8, 12, 14 |
| *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514 (10th Cir. 1984) | 8, 11, 12 |
| *Keeney* v. *FBI*, 630 F.2d 114 (2d Cir. 1980) | 9 |
| *Keys* v. *United States Dep't of Justice*, 830 F.2d 337 (D.C. Cir. 1987) | 12 |
| *Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981) | 5 |
| *Landano* v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989) | 3 |
| *Landano* v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990) | 3 |

Cases—Continued: Page

*Lewis* v. *University of Pittsburgh*, 725 F.2d 910 (3d Cir. 1983), cert. denied, 469 U.S. 892 (1984) ..... 7
*Miller* v. *Bell*, 661 F.2d 623 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982) ..... 8, 12
*Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479 (11th Cir. 1992) ..... 8, 10, 12-13, 16, 17
*Nix* v. *United States*, 572 F.2d 998 (4th Cir. 1978) ..... 8
*Parton* v. *United States Dep't of Justice*, 727 F.2d 774 (8th Cir. 1984) ..... 8-9
*Schmerler* v. *FBI*, 900 F.2d 333 (D.C. Cir. 1990) ..... 8, 13
*Shaw* v. *FBI*, 749 F.2d 55 (D.C. Cir. 1984) ..... 10
*Spannaus* v. *United States Dep't of Justice*, 813 F.2d 1285 (4th Cir. 1987) ..... 16
*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) ..... 16
*United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ..... 5, 6, 15
*United States Dep't of State* v. *Ray*, 112 S. Ct. 541 (1991) ..... 5
*Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) ..... 19
*Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), petition for cert. pending, No. 91-1641 ..... 8, 19

Statutes and rules:

Freedom of Information Act, 5 U.S.C. 552 ..... 2
5 U.S.C. 552(a)(4)(B) ..... 16
5 U.S.C. 552(b)(6) ..... 3
5 U.S.C. 552(b)(7) ..... 2, 7, 15, 16, 18
5 U.S.C. 552(b)(7)(A) ..... 16
5 U.S.C. 552(b)(7)(C) ..... 3, 4, 5, 6, 15, 16
5 U.S.C. 552(b)(7)(D) (1982) ..... 13, 14, 18
5 U.S.C. 552(b)(7)(D) ..... *passim*
2d Cir. R. 35 ..... 7
3d Cir. I.O.P.:
Rule 9.5.3 ..... 7
Rule 9.6.4 ..... 7



Miscellaneous: Page

S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. (1974) ..... 6, 11
S. Rep. No. 221, 98th Cong., 1st Sess. (1983) ..... 15, 18
*Webster's Third New International Dictionary* (1986) ..... 10

# In the Supreme Court of the United States

OCTOBER TERM, 1991

---

No.

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

VINCENT JAMES LANDANO

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

The Solicitor General, on behalf of the United States Department of Justice and the Federal Bureau of Investigation, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (App., *infra*, 31a-47a and 48a-61a) are reported at 751 F. Supp. 502 and 758 F. Supp. 1021, respectively.

### JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. App., *infra*, 62a-63a. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * *.

## STATEMENT

1. Respondent was convicted in state court for the 1976 murder of John Snow, a New Jersey police officer. In September 1988 and January 1989, respondent filed requests with the FBI under the Freedom of Information Act (FOIA) for information that the FBI had compiled in the course of its involvement in the investigation.[1] In May 1990, the

[1] Although the investigation was principally a state matter, the FBI became involved in part because of the need for interstate "unlawful flight" warrants to apprehend certain suspects. Respondent has insisted that Victor Forni was the actual killer and that New Jersey officials withheld exculpatory evidence, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Respondent's initial efforts to obtain habeas corpus relief in state and federal court were unsuccessful. *Landano* v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989). The federal district court subsequently granted relief, based on allegations of newly discovered evidence; that ruling, however, was reversed because of petitioner's failure to exhaust state remedies. *Landano* v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990). Respondent is now pursuing those issues in the New Jersey courts. App., *infra*, 2a.



FBI released several hundred pages of documents, some of which contained redactions, and withheld several hundred other pages in their entirety. Material was withheld principally under FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C), which protect against unwarranted invasions of personal privacy, and Exemption 7(D), 5 U.S.C. 552(b)(7)(D), which protects confidential sources of law enforcement information.[2]

Respondent filed the present action in May 1990. Both sides moved for summary judgment. The Department of Justice and the FBI (hereinafter the FBI) submitted the declaration of Special Agent Regina M. Superneau, which described the FBI's

[2] The records released in May 1990 related to respondent's first and principal request, which was for all records concerning the investigation of Officer Snow's murder. Respondent's second FOIA request—for records specifically concerning Forni—was initially denied in its entirety under Exemption 7(C). Forni subsequently consented to disclosure, and the FBI then reprocessed the second request without reliance on any privacy interests of Forni. App., *infra*, 35a-36a. The Exemption 7(D) rulings of the courts below related to both sets of records. *Id.* at 51a-52a.

search for the requested records and the reasons for withholding various portions of them. C.A. App. 156-185. The declaration discussed in detail the FBI's rationale for invoking a particular exemption for each category of information and assigned a code to each category. The same codes were then used to indicate, on a set of redacted documents, the reasons for each withholding. *Id.* at 166-167 (¶¶ 17-20); see App., *infra*, 37a-38a. For example, category "(b)(7)(D)-(3)" referred to individuals who provided information under implied promises of confidentiality, and to information provided by such persons. C.A. App. 179-183 (¶¶ 47-52). The declaration also described in detail the FBI's need for cooperation by such persons, the inherent dangers they would confront if their identities or the information they furnished were released to the public, and the implicit assurances of confidentiality present whenever the FBI interviews individuals in the course of a criminal investigation. *Ibid.* Other categories of information for which the FBI invoked Exemption 7(D) included internal FBI source symbols for especially sensitive informants, identities of and information provided by informants who provided information to the FBI on a continuing basis, identities of and information provided by local law enforcement agencies, and identities of and information provided by financial or commercial institutions. *Id.* at 176-185 (¶¶ 43-55); see App., *infra*, 19a-20a.

2. In a decision dated November 29, 1990, the district court sustained some of the FBI's withholdings, but rejected many of its pivotal arguments under Exemptions 7(C) and 7(D). App., *infra*, 31a-47a. With respect to Exemption 7(D), at issue here, the court held that the FBI's categorical explanations sufficed for certain witnesses and "undercover agents," but that for "all other information withheld



by defendant under (b)(7)(D), the court requires case-specific reasons for non-disclosure which were not supplied by [the FBI]." App., *infra*, 45a.[3]

In response to the FBI's motion for reconsideration, the court reaffirmed and explained its ruling. App., *infra*, 48a-61a. Citing the Third Circuit's ruling in *Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (1981), the court held that the FBI must make a particularized showing regarding the circumstances of each source for which it invokes Exemption 7(D). It accordingly rejected the proposition that promises of confidentiality are "inherently implicit" whenever the FBI collects information in the course of a criminal investigation. App., *infra*, 52a-55a.

3. A panel of the court of appeals affirmed in part and reversed in part. App., *infra*, 1a-30a. On the issue of invasion of personal privacy under Exemption 7(C), the court of appeals joined several other courts in recognizing that persons whose names appear in criminal law enforcement records necessarily have a significant privacy interest regarding the release of such information. *Id.* at 6a-7a. It also recognized that under *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and *United States Dep't of State* v. *Ray*, 112 S. Ct. 541 (1991), there is no cognizable "public interest" in the disclosure of the records withheld under Exemption 7(C), because there is no indication that they would reveal anything about the workings of the FBI. The court of appeals accordingly reversed the district court's judgment insofar as it ordered release of information the

[3] The court declined to conduct an *in camera* inspection of the documents. App., *infra*, 45a-46a.

FBI had withheld under Exemption 7(C). App., *infra*, 9a-17a.

By contrast, the panel affirmed the district court's order requiring release of information the FBI had withheld under Exemption 7(D). App., *infra*, 17a-30a. The panel recognized that Exemption 7(D) applies to all "confidential sources," without resort to any balancing of interests. *Id.* at 18a. This principle, the panel explained, reflects the purpose of Exemption 7(D), which is not primarily intended to protect the interests of the sources themselves, but rather serves "to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information." *Ibid.* The panel also noted the Conference Report's statement that Exemption 7(D) applies broadly to "citizen volunteer[s]," including both those who were expressly assured confidentiality and those who provided information "in circumstances from which such an assurance could reasonably be inferred." *Id.* at 21a, 22a (quoting S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)). Further, the panel recognized that the 1986 Amendments to FOIA—which permit an agency to withhold information that "could reasonably be expected to disclose" the identity of a confidential source or information furnished by such a source in a criminal investigation—were intended to "lighten the agency's burden in invoking Exemption 7." *Id.* at 23a (quoting *Reporters Committee*, 489 U.S. at 756 n.9).

The panel nevertheless rejected the FBI's submission that, in light of the sensitive nature of FBI criminal investigations, the very fact that a person provides information to the FBI in the course of such an investigation is sufficient (in the absence of contrary evidence) to support an inference of confi-



dentiality, and therefore to permit withholding under Exemption 7(D). While acknowledging conflicting decisions in a number of other circuits and characterizing the question as "difficult" (App., *infra*, 21a-23a, 26a), the panel deemed itself bound by the Third Circuit's prior decision in *Lame*, which it read to require "a showing by the government of the particular circumstances of an interview or source." *Id.* at 28a. The panel rejected the FBI's argument that *Lame*'s rationale has been superseded by *Reporters Committee*'s approval of a categorical approach to withholding under Exemption 7, and by the 1986 amendments' lessening of the government's burden under that exemption. *Id.* at 28a-29a.

Because of the importance of Exemption 7(D) in protecting confidential sources and the panel's acknowledgement that its approach diverged from that of several other courts of appeals, the FBI filed a petition for rehearing with suggestion of rehearing en banc, so that the full court of appeals could reconsider *Lame*. The court of appeals denied rehearing, even though a majority of the judges voting (including Judge Stapleton, the author of the panel opinion) voted to rehear the case en banc. App., *infra*, 62a-63a.[4]

---

[4] The vote was 5-4 in favor of rehearing, with two judges recused. Although the rules of some circuits would have resulted in the granting of rehearing en banc under such circumstances (see, *e.g.*, 2d Cir. R. 35), the Third Circuit adheres to the rule that rehearing en banc may be ordered only upon the affirmative vote of a majority of all active judges. See *Lewis* v. *University of Pittsburgh*, 725 F.2d 910, 928 (1983) (statement of Adams, J.), cert. denied, 469 U.S. 892 (1984). (Because Senior Judge Aldisert was a member of the panel, he could have participated if rehearing en banc had been granted; he could not, however, vote on the question of granting rehearing en banc. See 3d Cir. I.O.P. 9.5.3, 9.6.4.)

## REASONS FOR GRANTING THE PETITION

In reaffirming its rule that an agency's invocation of Exemption 7(D) must be based on "detailed explanations relating to each alleged confidential source" (App., *infra*, 27a), the Third Circuit has placed itself in conflict with at least six of its sister circuits. Those courts have recognized that confidentiality is implicit in the very nature of an FBI interview conducted in the course of a criminal investigation, and they accordingly have held that FOIA does not require an individualized showing of the circumstances of each such interview. See *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571, 575-577 (D.C. Cir. 1990); *Schmerler* v. *FBI*, 900 F.2d 333 (D.C. Cir. 1990); *Donovan* v. *FBI*, 806 F.2d 55, 61 (2d Cir. 1986); *Diamond* v. *FBI*, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Miller* v. *Bell*, 661 F.2d 623, 627 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514, 1517-1518 (10th Cir. 1984); *Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479, 1484-1487 (11th Cir. 1992); see also *Irons* v. *FBI*, 880 F.2d 1446, 1447 (1st Cir. 1989) (en banc) (dictum).[5]

[5] The only court of appeals that has given any indication that it would follow an approach similar to that of the Third Circuit is the Ninth Circuit, in *Wiener* v. *FBI*, 943 F.2d 972, 987 & n.29 (1991), petition for cert. pending, No. 91-1641. See note 11, *infra*. Although the Tenth Circuit in *Johnson* identified the Second, Fourth, and Eighth Circuits as requiring a more detailed evidentiary showing, 739 F.2d at 1517, the cases it cited merely mentioned the specific circumstances that were shown in those cases; none held that such a showing is required. See *Nix* v. *United States*, 572 F.2d 998, 1003-1004 (4th Cir. 1978); *Parton* v. *United States Dep't of Justice*, 727 F.2d 774, 776-777 (8th Cir. 1984); *Keeney* v. *FBI*, 630 F.2d 114, 119-120 (2d Cir. 1980).



The rule adopted by other courts of appeals is fully consistent with the text of Exemption 7(D)—especially in light of the 1986 amendments—and is essential to enable the exemption to serve its intended purpose of ensuring the continued flow of law enforcement information. The decision below, by contrast, endangers continued access to law enforcement sources by the FBI and other agencies, because it imposes an evidentiary burden that will, in many instances, be impossible to meet. Review is warranted to resolve the circuit conflict and to preserve the ability of the FBI and other federal law enforcement agencies to protect vital sources of information.

1. The court of appeals erred in holding that the FBI was required to submit detailed evidence concerning the particular interview in which a given source furnished information to the government in order to establish that the source is "confidential." It was sufficient for the FBI to show, as it indisputably did, that the source furnished information to the FBI in the course of a criminal investigation. Confidentiality is inherent in that setting.

a. Exemption 7(D) permits the FBI or other law enforcement agency to withhold records if their production "could reasonably be expected to disclose the identity of a confidential source."[6] This language refers to the confidentiality of the source, not the particular interview or the information it yields. See *Dow Jones*, 917 F.2d at 578. It therefore does not

[6] Exemption 7(D) further permits withholding if release could reasonably be expected to disclose "information furnished by a confidential source" to a law enforcement agency in the course of a criminal investigation.

suggest that the FBI must introduce evidence, satisfactory to a court, concerning the details of the FBI's interviews with each source.

Under the most natural meaning of the word "confidential" as used in the clause quoted above, a source is "confidential" if he is "known only to a limited few" and his identity is "not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). Persons who furnish information to the FBI in the course of criminal investigations will almost invariably satisfy this standard.

The word "confidential" may also mean "communicated, conveyed, acted on, or practiced in confidence." *Webster's Third New International Dictionary* 476 (1986); see *Shaw* v. *FBI*, 749 F.2d 55, 61 (D.C. Cir. 1984). The FBI's withholding in this case was fully consistent with the statutory text even if the word "confidential" embraces this meaning as well. Based on its accumulated experience and expertise, the FBI has reasonably concluded that it must maintain the atmosphere of "confidence"—*i.e.*, trust and privacy[7]—in which such information is "conveyed" or "communicated" by sources and "acted on" by the FBI. See *Nadler*, 955 F.2d at 1486 ("The FBI has a long-standing policy of treating as confidential all information obtained during the course of an investigation.").[8] Neither court below pointed

[7] See *Webster's Third New International Dictionary* 476 (1986) ("confidence"; def. 6).

[8] Because Exemption 7(D) permits an agency to withhold information that could disclose the identity of one of its "confidential source[s]," the statutory text attaches considerable significance to whether the source is "confidential" from the agency's perspective. By the same token, "[m]ost people would assume that the information they give to a criminal



to any basis for discrediting the FBI's assessment of the confidential role of sources in its criminal investigations. Nor did either court cite any evidence that might rebut this general rule with respect to any of the sources in this case. Accordingly, the FBI's withholding is fully supported by the statutory text.

By contrast, nothing in the text of Exemption 7(D) supports the Third Circuit's holding that the FBI may *not* presumptively treat as confidential and shield from public view the identities of all persons who furnish information in the course of its criminal investigations. Exemption 7(D), on its face, requires no more than that a source having certain characteristics may reasonably be deemed "confidential," and that the release of the requested information could reasonably be expected to disclose the identity of a source falling within that category.

b. The legislative history of Exemption 7(D) confirms the breadth of the category of sources that Congress intended the exemption to protect. As the court below noted, Congress rejected the term "informer" (which had been used in the Senate bill) in order to make clear that the exemption would protect not only paid informants, but "also a 'citizen volunteer' who has 'provided information under an express assurance of confidentiality *or* in circumstances from which such an assurance could reasonably be inferred.'" App., *infra*, 22a (quoting S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)) (emphasis added by court). Here, the relevant "circumstances" are that the source furnished information in the course of a criminal investigation; in that setting, an assurance of confidentiality may

law enforcement official during a criminal investigation will be kept confidential." *Johnson*, 739 F.2d at 1518.

"reasonably be inferred." The Conference Report does not suggest a further requirement, not contained in the text of Exemption 7(D), that the FBI must produce detailed evidence about the interview with each source.

c. Even before the 1986 amendments to Exemption 7, well-reasoned appellate decisions recognized that a showing of the latter sort is not required. In its seminal decision in *Miller* v. *Bell*, the Seventh Circuit approved the FBI's invocation of Exemption 7(D) on the basis of an affidavit that, like the one submitted in this case, identified excisions by type and addressed applicable confidentiality concerns, without describing the specifics of each interview. See 661 F.2d at 627. The court discussed the legislative history surrounding the original enactment of Exemption 7(D) in 1974, which established that Congress did not intend to impose a "heavy burden" on the FBI in protecting sources. *Ibid.*; accord, *Nadler*, 955 F.2d at 1485 (discussing 1974 legislative history). The *Miller* court then recognized that the very nature of FBI criminal investigations justifies invocation of Exemption 7(D):

> Unless there is evidence to the contrary in the record, we believe such promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation. This is necessary not only to protect the individual interviewee, but also to insure the continuing efficacy of FBI criminal investigation.

661 F.2d at 627. Other courts have echoed the "inherently implicit" language in reaching the same result. See *Keys* v. *United States Dep't of Justice*, 830 F.2d 337, 345 (D.C. Cir. 1987); *Ingle*, 698 F.2d at 269; *Johnson*, 739 F.2d at 1517-1518; *Nadler*, 955 F.2d at 1486; *Irons*, 880 F.2d at 1447 (dictum).



The courts adopting this approach have also emphasized the enormous practical difficulties that the FBI and other federal law enforcement agencies would confront if they were required to make an individualized showing of the circumstances surrounding each witness interview. For example, in *Donovan*, the Second Circuit recognized that the law enforcement function of the FBI "depends for its existence upon information supplied by individuals who in many cases would suffer severe detriment if their identities were known." 806 F.2d at 61. Accordingly, it adopted the approach that we urge, because it realized that to require a source-by-source showing of confidentiality would impose an enormous "practical difficulty—if not impossibility" on the use of Exemption 7(D). *Ibid.*; see also *Nadler*, 955 F.2d at 1485-1486. The present case illustrates this difficulty, because the records respondent seeks are for the most part 15 years old. See also *Schmerler*, 900 F.2d at 336 (upholding application of Exemption 7(D) to records over 50 years old). It will frequently be impossible for the FBI to produce affiants with first-hand recollection of such matters. Furthermore, records of witness interviews typically provide little detail about the conduct of the interview; they merely set forth the substantive information the FBI must have to get its work done. Accordingly, an artificial requirement of "detailed explanations relating to each alleged confidential source" (App., *infra*, 27a) is a recipe for *precluding* the protection of confidential sources in many instances.

d. For the foregoing reasons, the ruling below would be incorrect even if the question were—as it was under Exemption 7(D) prior to 1986—whether

release of the requested records "would * * * disclose" confidential source information. 5 U.S.C. 552(b)(7)(D) (1982). The basic fact that a source revealed information to the FBI in the course of a criminal investigation is sufficient (in the absence of contrary evidence) for a court to conclude that the source qualifies as a "confidential source."

The proper approach to this issue is made even clearer, however, by the 1986 amendments to Exemption 7(D), which were specifically intended to "broaden the reach of [Exemption 7] and to ease considerably a Federal law enforcement agency's burden in invoking it." *Irons*, 880 F.2d at 1452. Under the amended version of Exemption 7(D), the FBI need not show that release of a particular record "would * * * disclose" confidential source information; it need only show that release "could reasonably be expected to disclose" such information.

The court below recognized that this amendment concerns "the degree of risk of confidential source disclosure Congress was willing to accept" (App., *infra*, 29a), but it failed to appreciate that the amendment on its face encompasses more than one kind of risk. One form of uncertainty to which that language clearly applies is the situation where the requested information does not expressly identify the source, but "could reasonably be expected" to have that effect if disclosed because it contains potentially identifying clues. A different form of uncertainty is presented here. Where, as is typically the case, the FBI possesses material that a person provided in the course of a criminal investigation but has little or no further information about the precise circumstances under which he did so, it nonetheless is very likely as an empirical matter (given the circumstances of criminal investigations generally) that



the person qualifies as a "confidential source." It may be difficult in a given case to prove with certainty that the particular source is confidential, and therefore that production of the requested documents "would" disclose the identity of a confidential source, as Exemption 7(D) previously required. But now the FBI need only show that it "could reasonably be expected" that production would disclose the identity of a confidential source. This language naturally encompasses the situation presented here, in which disclosure would identify a source, and it is highly likely (even if not certain) that the source qualifies as "confidential."

This Court has recognized the relationship between the "could reasonably be expected" language—which was inserted in 1986 into several subparts of Exemption 7—and the level of specificity needed to invoke the relevant exemption. In *Reporters Committee*, the Court considered the application of Exemption 7(C) to FBI "rap sheets." In light of the nature of the information in rap sheets—for which disclosure would invariably engender some invasion of privacy, yet would not ordinarily provide the public with any meaningful information about the conduct of the FBI —the Court concluded that a "categorical" approach was appropriate. It accordingly held that rap sheets as a class are protected by Exemption 7(C), without any need for a case-by-case assessment. 489 U.S. at 776-778. The Court pointed out that such a categorical approach finds specific support in the 1986 amendments, which were "intended to replace a focus on the effect of a particular disclosure 'with a standard of reasonableness . . . based on an objective test.'" *Id.* at 778 n.22 (quoting S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983)); cf. *Spannaus* v.

*United States Dep't of Justice*, 813 F.2d 1285, 1288-1289 (4th Cir. 1987) (discussing effect of 1986 amendments on Exemption 7(A)).

The court below erroneously dismissed *Reporters Committee* as irrelevant on the ground that it involved the Exemption 7(C) "balancing" test. App., *infra*, 29a. By contrast, other courts addressing the same issue have recognized the importance of *Reporters Committee*'s teachings concerning the propriety of categorical analyses under Exemption 7 generally. For example, in *Dow Jones*, the D.C. Circuit reaffirmed its rule that there is a "presumption" of confidentiality whenever the FBI receives information in the course of a criminal investigation, and that the presumption can be overcome only by evidence specifically negating the normal inference of confidentiality.[9] The *Dow Jones* court relied on *Reporters Committee* in concluding that the sort of categorical determination embodied in this presumption is an appropriate and useful means of avoiding "*ad*

[9] The court below properly discounted respondent's objection that a "presumption" of an assurance of confidentiality would be inconsistent with the requirement in 5 U.S.C. 552 (a) (4) (B) that the government bear the burden in justifying withholding. See App., *infra*, 23a. As the D.C. Circuit explained in *Dow Jones*, there is no inconsistency between use of a presumption and the statutory burden of proof, because the presumption is directed to "the quantum of evidence necessary to carry the burden." 917 F.2d at 579 (Silberman, J., concurring in denial of rehearing en banc); see also *Nadler*, 955 F.2d at 1486 (endorsing "presumption"). In any event, the formulation preferred by the court below—focusing on what showing is necessary to establish a "*prima facie* case" under Exemption 7(D) (App., *infra*, 23a-24a)—is not inconsistent with recognition of a "presumption." See generally *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 252-256 (1981).



*hoc*—and therefore unprincipled—determinations." 917 F.2d at 577; see also *id.* at 579 (Silberman, J., concurring in denial of rehearing en banc). Accord, *Nadler*, 955 F.2d at 1486-1487 n.7 (citing *Reporters Committee* in support of proposition that "the congressional requirement of a specific showing of confidentiality does not prevent a categorical determination that sources in an FBI criminal investigation are presumptively confidential").

2. The decision of the Third Circuit plainly warrants review. In requiring an individualized factual showing regarding the circumstances of each source in order to invoke Exemption 7(D), the Third Circuit has ignored this Court's teachings, added a burdensome requirement not called for by the text of Exemption 7(D), and endangered the continuing access of the FBI and other federal law enforcement agencies to sources of vital information. The practical ramifications of the decision below stem not only from the inability of the FBI to protect sources in many instances, but also from the chilling effect that even *uncertainty* about the application of Exemption 7(D) can have on potential witnesses. As the Eleventh Circuit recognized in *Nadler* (955 F.2d at 1486):

> a rule requiring the FBI to produce evidence regarding each individual source's particular expectations as to confidentiality would cause potential sources to fear that the information they relay to the FBI will become public knowledge along with their identity and the fact that they freely disclosed the information to the FBI. Moreover, it is beyond dispute that an increased fear of exposure would chill the public's willing-

ness to cooperate with the FBI in the course of criminal investigations.[10]

These concerns conform to those expressed by Congress itself when it enacted the 1986 amendments. The Senate Committee that initially recommended those amendments reported that the difficulty encountered by agencies in invoking Exemption 7 had "harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations," and had "slowed the flow of confidential information to the law enforcement community." S. Rep. No. 221, *supra*, at 2. The committee specifically related these problems to the "would * * * disclose" formulation in the prior version of Exemption 7(D), explaining that the burden of proof inherent in that language was "substantially contributing to the asserted 'perception' problem of sources doubting the FBI's ability to protect their identities from disclosure through FOIA." S. Rep. No. 221, *supra*, at 23-24. In substituting the "could reasonably be expected" standard, Congress "recognize[d] the lack of certainty in attempting to predict harm" from disclosure. *Id.* at 24.

---

[10] In an analogous context, this Court expressed "serious[] doubt[s] whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information." *CIA* v. *Sims*, 471 U.S. 159, 176 (1985). Whether the question concerns the circumstances justifying a promise of confidentiality in an intelligence matter or the circumstances justifying an inference of confidentiality in a criminal matter, "[t]here is no reason for a potential * * * source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make those judgments correctly." *Ibid.*



Effectuation of the purposes served by Exemption 7(D) not only requires adoption of the approach we urge on the merits; it also requires consistency and clarity in the law as articulated by the various federal courts. As explained above, the inconsistency between the ruling below and those of numerous other circuits could not be more evident. The panel itself acknowledged that "six other courts of appeals have reached decisions that are in tension, if not in direct conflict, with" the rule it reaffirmed. App., *infra*, 30a; see page 8, *supra*. Only if the courts speak with one voice can the FBI and the sources upon which it relies proceed with sufficient assurance that information furnished in the course of criminal investigations will remain confidential. Given the ruling below, that consistency and clarity can now be provided only by this Court.[11]

---

[11] In *Wiener* v. *FBI*, the Ninth Circuit purported to leave open the possibility of employing a "presumption" of confidential status for sources under Exemption 7(D). Nevertheless, as part of its broad ruling concerning the level of detail necessary in *Vaughn* indices (see *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)), it imposed an evidentiary requirement that the FBI show the individual circumstances of each source. 943 F.2d at 987 & n.29. As we have pointed out in our certiorari petition in *Wiener*, that ruling effectively conflicts with the decisions of other circuits applying Exemption 7(D). See No. 91-1641 Pet. 18-19. However, because the focus of the certiorari petition in *Wiener* is on the distinct procedural issue of the adequacy of *Vaughn* indices, the Court's decision in *Wiener* (if certiorari is granted) might not resolve the circuit conflict concerning the substantive protection afforded by Exemption 7(D).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

STUART M. GERSON
*Assistant Attorney General*

JOHN G. ROBERTS, JR.
*Deputy Solicitor General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

LEONARD SCHAITMAN
JOHN F. DALY
*Attorneys*

JUNE 1992

## APPENDIX A

## UNITED STATES COURT OF APPEALS
## THIRD CIRCUIT

---

No. 91-5161

VINCENT JAMES LANDANO

*v.*

UNITED STATES DEPARTMENT OF JUSTICE;
THE FEDERAL BUREAU OF INVESTIGATION,
APPELLANTS

---

Argued May 20, 1991

Decided Feb. 11, 1992

As Amended Feb. 24, 1992

---

Before STAPLETON, SCIRICA and ADLISERT, Circuit Judges.

### OPINION OF THE COURT

STAPLETON, Circuit Judge:

In this appeal, we focus on Exemptions 7(C) and 7(D) to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(b)(7)(C)-(D). These exemptions are at the center of a dispute between plaintiff-appellee Vincent Landano and defendants-appellants

the Federal Bureau of Investigation and Department of Justice (collectively the "FBI") over Landano's request under the FOIA for documents relating to the 1976 murder of a police officer. Landano was convicted for that murder in a New Jersey state court. The district court granted summary judgment to Landano and ordered the FBI to release information that it had withheld as exempt. The FBI has appealed. We will affirm in part, reverse in part, and remand.

I.

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearney, New Jersey. During the course of the robbery, one of the two men shot and killed a police officer, John Snow. The FBI was involved, as were New Jersey state law enforcement officials, in the investigation of the murder. A state grand jury indicted Landano for felony murder, and he was convicted. Landano has always maintained that he did not participate in the robbery and that a man named Victor Forni was the killer of Officer Snow.

Landano attacked his conviction in a federal habeas corpus proceeding asserting that the state prosecutors violated the rule of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by suppressing exculpatory evidence. The United States District Court for the District of New Jersey found merit in this argument and ordered that Landano be retried or released. This court reversed because Landano had not exhausted his state remedies. *Landano v. Rafferty*, 897 F.2d 661 (3d Cir.), *cert. denied*, ——U.S.——, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990). Landano is apparently pursuing that claim at present in the New Jersey state court system.



Landano has simultaneously sought to obtain FBI files under the FOIA in the hope that they will contain exculpatory evidence or lead to the discovery of such evidence. Landano first sent a letter to the FBI's Newark field office requesting all information pertaining to the murder of Officer Snow. In response, the FBI provided 324 pages of a 726-page file, some of which were redacted. Thereafter, Landano sent the FBI a request for all information on Victor Forni. The FBI released only a portion of that file as well. As to the information in the Snow and the Forni files at issue here, the FBI contended that the release of some of the information would violate the privacy rights of individuals named in those files and that the release of other information would violate confidentiality expressly or impliedly promised by the FBI to persons from whom the FBI received information in the course of its investigation.

After exhausting his administrative appeals, Landano initiated this proceeding in the district court requesting that the court order the FBI to produce the entire contents of the requested files. The FBI submitted an affidavit of FBI Special Agent Regina Superneau detailing its reasons for withholding information under Exemptions 7(C) and 7(D), as well as under other exemptions not at issue here. The court granted summary judgment to Landano and ordered the FBI to release essentially all of the withheld material other than information that would disclose the identity of, or communications from, informants or undercover agents.

II.

The FOIA, which is a part of the Administrative Procedure Act, requires that any federal agency promptly make available any records requested of it

by any person so long as the request "reasonably describes such records." 5 U.S.C. § 552(a)(3). If an agency improperly withholds such documents, a federal district court may order production. Congress has exempted nine important categories of information from this blanket requirement, however. In this case, we are concerned with Exemption 7(C) and Exemption 7(D).

A. *Exemption 7(C).*

We first consider of Exemption 7(C). Exemption 7(C) exempts from disclosure "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C). If the agency invokes Exemption 7(C), it has the burden "to sustain its action." *Id.* § 552(a)(4)(B).

An agency's invocation of Exemption 7(C) requires us to identify the privacy interests that would be affected by release of the requested information as well as the public interests that would be served by disclosure. After identifying the competing interests we are then called upon to balance those interests to determine if disclosure is appropriate, i.e., whether disclosure "could reasonably be expected to constitute an *unwarranted* invasion of personal privacy." § 552(b)(7)(C) (emphasis supplied). *See United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989).

Landano does not dispute the right of the FBI to withhold the names of FBI undercover agents or FBI informants. We are concerned here with: (1) the names of other FBI employees that appear in the requested documents; (2) the names of the persons interviewed during the investigation; (3) the names of third parties mentioned by those interviewed; and (4) the identities of state and local law enforcement personnel who participated in the investigation. Thus, our Exemption 7(C) analysis is concerned solely with the failure to disclose the identity of individuals who were involved in the investigation or in the events with which the investigation was concerned.



1. *Privacy Interests*

The district court held that the FBI had not made an adequate showing that disclosure of the information withheld under Exemption 7(C) would implicate anyone's privacy interest. In its words, the "defendant offers nothing to convince the court that the dangers involved in releasing such information exist in this particular case, particularly in view of the approximately 14 years which have elapsed since the underlying investigation." *Landano v. United States Dep't of Justice*, 751 F.Supp. 502, 508 (D.N.J.1990). We do not agree.

Numerous courts of appeals have recognized that individuals involved in a criminal investigation—including suspects, witnesses, interviewees, and investigators—possess privacy interests, cognizable under Exemption 7(C), in not having their names revealed in connection with disclosure of the fact and subject matter of the investigation. *See, e.g., Safecard Services, Inc. v. SEC*, 926 F.2d 1197, 1205 (D.C.Cir.1991) ("suspects, witnesses and investigators" have privacy interests implicated by release of their names in connection with a criminal investigation); *KTVY-TV v. United States*, 919 F.2d 1465, 1469 (10th Cir.1990) (witnesses and persons named by them have privacy

interests). Suspects of the investigation have the most obvious privacy interest in not having their identities so revealed. *Baez v. United States Dep't of Justice*, 647 F.2d 1328, 1338 (D.C.Cir.1980). However, disclosure of the names of interviewees and witnesses may result in embarrassment and harassment to them as well. Criminal investigations turn up a myriad of details about the personal lives of witnesses and interviewees and for some, disclosure of the fact of cooperation with the investigation may itself result in reprisals or strained personal relationships. Moreover, as this case demonstrates, many people may have reason to seek out and question those who have supplied information in the course of a criminal investigation. *See, e.g., Halloran v. Veterans Admin.*, 874 F.2d 315, 321 (5th Cir.1989), ("many of the nonsuspects who are identified or referred to in the transcripts have discernible privacy interests in not having their thoughts, comments, and views regarding their work, their job performance, and their co-workers, clients, and friends released to the public. Moreover, merely being associated with a criminal investigation may lead to further embarrassment and difficulties."); *Cleary v. FBI*, 811 F.2d 421, 424 (8th Cir.1987) (recognizing privacy interests in avoiding "unnecessary questioning concerning the investigation [and] subpoenas issued by private litigants in civil suits incidentally related to the investigation," although conceding that these privacy interests may be overborne by greater public interests).

Moreover, this court has held that even the law enforcement personnel involved in a criminal investigation have a privacy interest, cognizable under Exemption 7(C), in not having their identities disclosed. In *Patterson by Patterson v. FBI*, 893 F.2d



595, 601 (3d Cir.), *cert. denied*, ——U.S.——, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990), we concluded that the FBI acted properly in withholding under Exemption 7(C) the names of the FBI personnel who had conducted an investigation because investigators have a privacy interest in not being identified with particular investigations and because in the context of that case "only a negligible benefit would inure to the public by releasing" the names of the law enforcement personnel involved. Other courts of appeals have recognized the same privacy interest. *See, e.g., Ingle v. United States Dep't of Justice*, 698 F.2d 259, 269 (6th Cir.1983) ("It is, of course, well established that FBI agents themselves have the right to be protected against public disclosure of their participation in law enforcement investigations pursuant to exemption (b)(7)(C)."); *Nix v. United States*, 572 F.2d 998, 1006 (4th Cir.1978) ("One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties. Public identification of any of these individuals could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives.").

Our decision in *Lame v. United States Department of Justice*, 654 F.2d 917 (3d Cir.1981) is not at odds with these authorities. There, we stated that there is no *per se* rule that "the mere connection of an individual with a criminal investigation constitutes an *unwarranted* invasion of his privacy." *Id.* at 923 n.6 (emphasis added). We read this observation not to imply that such a person has no privacy interest in such a case, but rather that such a privacy interest does not always trump the public interest in disclosure. The inclusion in this observation of the word

"unwarranted," which is the textual basis for the balancing of private and public interests under Exemption 7(C), supports this reading of *Lame*.

While the privacy interests of those involved in a criminal investigation may become diluted by the passage of time, several courts have recognized that the potential for embarrassment and harassment may endure for many years. *E.g., Keys v. United States Dep't of Justice*, 830 F.2d 337, 348 (D.C.Cir.1987) (The passage of forty years "does not so dilute the privacy interest as to tip the balance the other way."); *Diamond v. FBI*, 707 F.2d 75, 77 (2d Cir. 1983) ("For persons who were subjects of an FBI investigation or who cooperated with the agency [during the McCarthy era] the potential for embarrassment, harassment, or other repercussions remains acute"), *cert. denied*, 465 U.S. 1004, 104 S.Ct. 995, 79 L.Ed.2d 228 (1984).[1] Since interest in the Snow homicide has not been extinguished by time, it seems apparent to us that some potential for embarrassment and harassment remains. Indeed, Landano

[1] An example of the longevity of individual privacy interests in government files has made its way into recent newspapers. With the unification of East and West Germany came the problem of dealing with the 6 million dossiers that the East German Secret Police had compiled on individuals within the country. The government of the unified Germany has chosen to release a person's file if that individual requests it. As a result, dissidents and other citizens now have access to the names of informers who passed information to the government. In one instance, an East German opposition leader who is now a member of the new parliament discovered that her husband had been passing information to the government for many years. *See Germans Rush to See Big Brother's Files*, Chi. Trib., Jan. 3, 1992, at 4; John Tagliabue, *Files of East German Secret Police Are Opened but Few Seek Access*, N.Y. Times, Jan. 3, 1992, at A2.



candidly acknowledges that he wants the names disclosed so that he may track down and question the participants in the Snow investigation. While his desire to do so is understandable and while their interest in not having the matter resurrected in their lives is not necessarily entitled to prevail, Landano's intentions do bear witness to the fact that privacy interests remain despite the passage of years.

We hold in accord with *Patterson* that individuals who are associated with a criminal investigation have a privacy interest under Exemption 7(C) of the FOIA such that the government may be justified in refusing to disclose their names. While that interest may be stronger for some categories of these persons than for others, we need not resolve that question until we are forced to balance the privacy interests that would be affected by disclosure against the public interest in disclosure.

### 2. *Public Interest*

We turn now to the asserted public interest in disclosure of these names. The district court concluded that Landano's "right to information that establishes his innocence and the public's interest in assuring that the innocent are not wrongfully convicted and confined furthers the policy concerns which engendered the statute." 751 F.Supp. at 503. The district court cited *Ferri v. Bell*, 645 F.2d 1213 (3d Cir. 1981) in support of this conclusion. There, a *federal* defendant requested material from the FBI files in order to show that *federal* prosecutors violated the *Brady* rule. We held that disclosure of such material would advance an "indirect public purpose." *Id.* at 1218. However, recognizing a public interest under the FOIA in uncovering federal violations of the

*Brady* rule does not require that we recognize an identical public interest in uncovering state violations of *Brady*.

Two recent decisions of the Supreme Court guide us in identifying the relevant public interests to be weighed against the privacy interest we have just discussed: *Reporters Committee* and *United States Department of State v. Ray*, —— U.S. ——, 112 S.Ct. 541, 116 L.Ed.2d 526 (1991). When the Supreme Court in *Reporters Committee* addressed the relevant public interest involved in withholding of an FBI rap sheet on a private individual, it first repeated statements from its earlier decisions that neither the "purposes for which the request is made" nor the "identity of the requester" can determine whether the public has an interest in disclosure. *Reporters Comm.*, 489 U.S. at 771, 109 S.Ct. at 1480. Thus, the question of public interest must turn on "the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act 'to open agency action to the light of public scrutiny,' " *id.* at 772, 109 S.Ct. at 1481 (quoting *Department of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1976)), that is, to let the citizenry "know what their government is up to." *Id.* 489 U.S. at 773, 109 S.Ct. at 1481. Accordingly, "[o]fficial information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various government files but that reveals little or nothing about an agency's own conduct." *Id.*

To illustrate these principles, the Court referenced its previous decision in *Department of Air Force v. Rose*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976). There, the requester had asked for disciplinary hearing summaries maintained in the Air Force Academy's files. The summaries were provided but were redacted to protect the identities of participants in the disciplinary proceedings. The Court in *Reporters Committee* noted that the summaries in *Rose* "obviously contained information that would explain how the disciplinary procedures actually functioned and therefore were an appropriate subject of a FOIA request. *Reporters Comm.*, 489 U.S. at 773, 109 S.Ct. at 1482. However, the Court stated that the *names* of particular cadets were "irrelevant to the inquiry into the way the Air Force Academy administered its Honor Code," *id.*, and had properly been withheld.



In *Reporters Committee*, the requester insisted that the public interest would be served by disclosure of the rap sheet because the individual whose criminal record was requested had allegedly had dealings with a corrupt Congressman and was an officer of a corporation with defense contracts. Noting that the rap sheet "would tell us nothing directly about the character of the *Congressman's* behavior" or "about the conduct of the *Department of Defense* (DOD) in awarding . . . contracts," the Court held that the alleged public interest in the release of the rap sheet was "not the type of interest protected by the FOIA." *Id.* at 774-75, 109 S.Ct. at 1482-83 (emphasis in original).

In *Ray*, the plaintiffs were undocumented aliens from Haiti who were seeking political asylum in the United States. They sought to prove that, as Haitians who immigrated illegally, they had a well-founded fear of persecution if they return to their homeland. The government asserted in response that any such

fear was unfounded. To support this assertion, the government relied in part on interviews conducted as a part of a State Department investigation designed to ascertain whether the Haitian government was living up to a commitment that indicted Haitians would not be subject to prosecution for illegal departure. An FOIA demand for all documents reflecting the interviews was honored by the State Department but the names of the interviewees and other identifying information were redacted. In *Ray*, the redacted information was withheld under Exemption 6,[2] but the case is nevertheless important for present purposes. The Supreme Court noted the similarity of the language in Exemption 6 and Exemption 7(C) and, indeed, pointed out that the government's burden is heavier under the former than the latter. Under Exemption 6, the government must show a "clearly unwarranted invasion of personal privacy" while under Exemption 7(C), only an "unwarranted invasion of personal privacy" must be shown.

After concluding that the refugees interviewed after their return to Haiti had a privacy interest in avoiding the disclosure of their names, the Court held that there was no relevant public interest in the disclosure of their identities:

> [T]he Court of Appeals properly recognized that the public interest in knowing whether the State Department has adequately monitored Haiti's compliance with its promise not to prosecute returnees is cognizable under FOIA. We are persuaded, however, that this public interest has

[2] Exemption 6 provides that the FOIA discolsure requirements do not apply to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6).



> been adequately served by disclosure of the redacted interview summaries and that disclosure of the unredacted documents would therefore constitute a clearly unwarranted invasion of the interviewees' privacy.
>
> The unredacted portions of the documents that have already been released to respondents inform the reader about the State Department's performance of its duty to monitor Haitian compliance with the promise not to prosecute the returnees. The documents reveal how many returnees were interviewed, when the interviews took place, the contents of individual interviews, and details about the status of the interviewees. The addition of the redacted identifying information would not shed any additional light on the Government's conduct of its obligation.

*Ray*, 112 S.Ct. at 549.

The Court in *Ray* acknowledged that the plaintiffs might be able to use the names to obtain from the interviewees information not contained in the State Department files that would be of help in their immigration proceedings. The Court declined the invitation of the government to adopt a *per se* rule that such "derivative use" of government information, i.e., the use of government information to discover helpful information not in the government's possession, could not serve a public interest protected by the FOIA. The Court held, however, that in the absence of reason to believe that the derivative use would produce information impugning the record impression of how the agency is performing its responsibilities, there was no relevant public interest to balance against competing privacy interests.

> The Government argues that such "derivative use" of requested documents is entirely beyond the purpose of the statute and that we should adopt a categorical rule entirely excluding the interest in such use from the process of balancing the public interest in disclosure against the interest in privacy. There is no need to adopt such a rigid rule to decide this case, however, because there is nothing in the record to suggest that a second series of interviews with the already-interviewed returnees would produce any relevant information that is not set forth in the documents that have already been produced. Mere speculation about hypothetical public benefits cannot outweigh a demonstrably significant invasion of privacy. Accordingly, we need not address the question whether a "derivative use" theory would ever justify release of information about private individuals.
>
> We are also unmoved by respondents' asserted interest in ascertaining the veracity of the interview reports. There is not a scintilla of evidence, either in the documents themselves or elsewhere in the record, that tends to impugn the integrity of the reports. We generally accord government records and official conduct a presumption of legitimacy. If a totally unsupported suggestion that the interest in finding out whether government agents have been telling the truth justified disclosure of private materials, government agencies would have no defense against requests for production of private information.

*Id.* 112 S.Ct. at 549-50.

Before the Supreme Court's decision in *Ray*, the Court of Appeals for the Fifth Circuit applied the



teachings of *Reporters Committee* to a case presenting facts similar to those involved here. *Burge v. Eastburn*, 934 F.2d 577 (5th Cir.1991). In *Burge*, a state inmate sought FBI records containing the pretrial statements of persons who had testified at his murder trial. The inmate argued that there was a public interest in ensuring that he had received a fair and impartial adjudication of guilt or innocence at trial. The court recognized that there is, of course, a public interest in fair trials and perhaps in the contents of alleged statements to the FBI. However, the court, relying on *Reporters Committee*, rejected the contention that this was a public interest cognizable under the FOIA: "As in *Reporters Committee*, the requester in this case 'does not intend to discover anything about the conduct of the agency that has possession of the requested records.'" *Id.* at 580 (quoting *Reporters Comm.*, 489 U.S. at 773, 109 S.Ct. at 1481).

The rationale of the district court in the current dispute for its finding of a relevant public interest is inconsistent with the teachings of *Reporters Committee*, *Ray*, and *Burge*. There is undoubtedly a public interest in seeing that the guilty are convicted and that the innocent are not. However, whether that particular public interest is recognized by the FOIA is a separate question. Only when the information requested reflects directly upon the way that the agency conducts business has the requester placed something on the public interest side of the balancing equation. Because the information requested by Landano would shed no light on the way that the FBI fulfills its responsibilities, it "falls outside the ambit of the public interest that the FOIA was enacted to serve." *Reporters Comm.*, 489 U.S. at 775, 109 S.Ct. at 1482.

Perhaps in recognition of the conflict between the district court's reasoning and that of these other decisions, Landano advances the additional argument that disclosure of the identities of those involved in the investigation would serve the public interest, as well as his own, because it may help him to show that information exculpatory to him and inculpatory to Forni was withheld from the defense. The public, he suggests, clearly has an interest in whether its law enforcement officers are engaging in this kind of misconduct.

Landano here paints with too broad a brush. Landano was convicted of murder in a state court. No federal prosecution ever took place in this case. Accordingly, any *Brady*-type wrongdoing must necessarily have involved the state prosecutors, not the FBI or federal prosecutors. To the contrary, the district court expressly found that there was no reason to believe there was any FBI wrongdoing involved in this case. Accordingly, we conclude that just as there is no FOIA-recognized public interest in discovering evidence in federal government files of a private party's violation of the law, *see Reporters Comm.*, 489 U.S. at 774, 109 S.Ct. at 1482, there is no FOIA-recognized public interest in discovering wrongdoing by a *state* agency.

3. *Balancing Private and Public Interests*

Because we have concluded that there is no public interest in the disclosure of the names here and that the individuals involved have at least some privacy interest in not having their names disclosed in connection with a criminal investigation, we conclude that the public interest asserted by Landano does not outweigh the privacy interests of others and,



accordingly, that disclosure of the names could reasonably be expected to constitute an unwarranted invasion of personal privacy.

We find this case virtually on all fours with *Ray*. Like the Haitians in *Ray*, Landano seeks the withheld names for understandable reasons but for reasons that are extraneous to the purpose of the FOIA. Here as there, there is information in the file that could be used for the relevant purpose of evaluating the performance of the federal agency involved but that information has been disclosed and there is no reason to believe that the additional disclosure of the names would materially enhance anyone's ability to perform that evaluation. Finally, here as there, while the names would permit the requester to investigate "behind the government files" and gather non-government held information that might conceivably reflect adversely on the performance of the federal agency, there is nothing in the record suggesting misconduct on the part of that agency. For the reasons given in *Ray*, we conclude that the FBI's reliance on Exemption 7(C) is justified.

Because the district court did not apply the correct legal standard in granting summary judgment under Exemption 7(C), we will reverse that portion of the judgment ordering production of materials withheld in reliance on Exemption 7(C).

B. *Exemption 7(D)*

Exemption 7(D) exempts from the FOIA's disclosure requirements:

> records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected

> to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution furnished on a confidential basis, . . . and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation . . ., information furnished by a confidential source.

5 U.S.C. § 552(b)(7)(D). Here again, the "burden is on the agency to sustain its action under this Exemption." 5 U.S.C. § 552(a)(4)(B).

When a source that has supplied information in the course of a criminal investigation is "confidential," the agency may withhold not only the source's identity but also any information obtained from that source. Thus, unlike the materials withheld under Exemption 7(C), more is at stake here than just the identity of the FBI's sources of information; information provided by allegedly confidential sources may be withheld as well. Moreover, Exemption 7(D), unlike Exemption 7(C), does not require or allow any weighing of interests or any consideration of the contents of the information. If information was provided by a confidential source, the courts may not order disclosure of that information no matter how strong the public interest in disclosure. This reflects the fact that the purpose of Exemption 7(D) is to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information. It is not, like Exemption 7(C), designed to protect against unwarranted invasions of privacy.

The FBI's affidavit in this case identifies the specific pages withheld and redacted portions of specific pages produced and asserts that the information there set forth was compiled for law enforcement



purposes and, if produced, could reasonably be expected to disclose the identity of a confidential source or information furnished by such a source. It goes on to make the following representations with respect to the experience of the FBI in conducting interviews during a criminal investigation:

> During the course of most investigations, many individuals who are not established sources of the FBI, are interviewed under circumstances in which confidentiality is created. These individuals furnish information with either an expressed or implied understanding that their cooperation will not be needlessly divulged outside the FBI. Release of the identities of these confidential sources or the information they provided could subject these sources to negative public attention, and could inhibit future cooperation from these individuals or other individuals in possession of information of value to the FBI.
>
> * * * * *
>
> When Agents of the FBI conduct interviews, the FBI is seeking the assistance of the interviewee either to obtain facts that will result in the prosecution of the subject(s) of an investigation or to solicit the cooperation and assistance of the interviewee in a matter which may impact on the national security of the United States. In both cases, the FBI is asking individuals to become involved in situations in which others may lose substantial liberty or property interests; thus, the interviewee is placed in a position that could subject him or her to acts of reprisal, harassment, litigation, or an unnecessary amount of public attention. Individuals providing information to Federal agencies in furtherance of

a law enforcement activity must be free to do so without fear of possible reprisal should their identities or their information be disclosed to persons in whom they have not confided. This is not to say that any such reprisal is threatened or even likely in this case, but a general public policy requires that individuals must be free to furnish investigative information to the Government with complete candor and without the understandable tendency to hedge or withhold information out of fear that their names or information furnished will later be made public. Persons providing information, including witnesses to a crime who may expect to be called upon at a later time to testify in public at a judicial proceeding, should be secure in the knowledge that, absent the necessity of such public testimony with its attendant judicial restraints and protections, their assistance and their identities will be held in confidence. The fear of such exposure all too often inhibits the cooperation of otherwise conscientious citizens. These considerations have been met by the traditional willingness and ability of the FBI to assure persons interviewed that their identities would be protected.

App. at 175-76, 180-81.

The FBI's affidavit provides no other details with respect to the circumstances of any particular interview or source. Further, it provides no reference to the character of the information withheld or the nature of the investigation, although there is apparently no dispute that the investigation involved was that of the Snow homicide and the parties agree



on the general background from which this case arises.

The district court held that the FBI's affidavit was insufficient, as a matter of law, to satisfy the FBI's burden of establishing that the information came from a "confidential source."[3] In challenging this conclusion, the FBI first refers us to legislative history indicating that a "confidential source" includes not only a person who has received an express assurance of confidentiality, but also a person who has provided information "in circumstances from which such an assurance can reasonably be inferred." The FBI then asserts that an affidavit like the one it has here filed will permit, and ordinarily should occasion, an inference that the information came from a confidential source. It cites cases from no less than six courts of appeals for the proposition that "promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation." *See Dow Jones & Co. v. United States Dep't of Justice*, 917 F.2d 571, 576 (D.C.Cir.1990); *Schmerler v. FBI*, 900 F.2d 333, 337 (D.C.Cir.1990); *Keys v. United States Dep't of Justice*, 830 F.2d 337, 345 (D.C.Cir. 1987); *Donovan v. FBI*, 806 F.2d 55, 61 (2d Cir. 1986); *Diamond v. FBI*, 707 F.2d 75, 78 (2d Cir. 1983), *cert. denied*, 465 U.S. 1004, 104 S.Ct. 995,

[3] The district court stated, *inter alia*, that the FBI had failed to provide "case specific reasons for non-disclosure" and that such reasons were required as a matter of law to sustain its burden. Because the FBI did represent that the specific information in the files here at issue was received in FBI interviews and thus came within the scope of Exemption 7(D), we take this to mean the district court believed some information concerning the circumstances of such interviews or sources was required.

79 L.Ed.2d 228 (1984); *Pope v. United States*, 599 F.2d 1388, 1386-87 (5th Cir.1979); *Ingle v. United States Dep't of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Brant Constr. Co. v. United States Envtl. Protection Agency*, 778 F.2d 1258, 1263 (7th Cir. 1985); *Miller v. Bell*, 661 F.2d 623, 627 (7th Cir. 1981), *cert. denied*, 456 U.S. 960, 102 S.Ct. 2035, 72 L.Ed.2d 484 (1982); *KTVY-TV v. United States*, 919 F.2d 1465, 1470-71 (10th Cir.1990); *Johnson v. United States Dep't of Justice*, 739 F.2d 1514, 1517-18 (10th Cir.1984). The district court's holding and this response of the FBI pose the issue for decision under Exemption 7(D).

We turn initially to the statutory language and legislative history. The legislative history indicates that the term "confidential source" includes more than undercover informers and undercover agents. The Conference Committee opted for the term "confidential source" over the term "informer" that was contained in the Senate version of the bill. This change was designed to make clear that a confidential source includes not only a paid informer but also a "citizen volunteer" who has "provided information under an express assurance of confidentiality *or* in circumstances from which such an assurance could reasonably be inferred." S.Rep. No. 1200, 93rd Cong., 2d Sess. 13, *reprinted in* 1974 U.S.Code Cong. & Ad. News 6267, 6291 (emphasis added). There is no direct evidence in the legislative history, however, as to whether Congress intended that every person interviewed pursuant to a criminal investigation was to be considered—at least in the absence of contrary evidence—a "confidential source."



The 1986 amendments to FOIA were adopted with almost no legislative background. Until 1986, Exemption 7(D) covered the production of records that "would disclose" the identity of a confidential source or information provided by a confidential source. The 1986 amendments changed the language so that the Exemption now covers the production of records or information that "could reasonably be expected to disclose" the identity of a confidential source or information provided by a confidential source. This change was intended to lighten the agency's burden in invoking Exemption 7, *Reporters Committee*, 489 U.S. at 756 n. 9, 109 S.Ct. at 1473 n. 9, and was consistent with a categorical approach at least with respect to Exemption 7(C) cases. *Id.* at 777-78 n. 22, 109 S.Ct. at 1484 n. 22. However, the amendments did not define "confidential source" with any greater precision than had been done earlier.

At times, the FBI characterizes its position as a contention that a presumption of an assurance of confidentiality arises as a matter of law whenever information is shown to come from an FBI interview in the course of a criminal investigation. Understandably, Landano responds that such a presumption is at odds with Congress's determination in the FOIA that the burden of establishing entitlement to an exemption rests upon the government. We believe this characterization of the FBI's position misstates the issue before us.

In the legislative history, Congress has supplied a definition of a confidential source. Included within that definition are persons who, while not the beneficiaries of an express assurance of confidentiality, nevertheless spoke under circumstances in which such an assurance can reasonably be inferred. If a gov-

ernment agency files an affidavit reciting all of the surrounding circumstances of a particular interview and the district court believes a reasonable interviewee would feel so assured under such circumstances, a conclusion that the interviewee was a confidential source is clearly warranted. The issue presented by the district court's decision in this case is how much less than such a showing will, in the absence of contrary evidence, permit such a conclusion. In other words, what is the "minimum evidentiary showing" that will permit an inference that the interviewee probably had a reasonable expectation of confidentiality? We thus view the issue as one of what constitutes a *prima facie* case of "confidential source." If the "minimum evidentiary showing" is enough to permit a rational inference that the person involved more likely than not falls within Congress's definition of "confidential source," the agency cannot be said to have gotten unfair assistance, in the form of a legal presumption, in meeting its statutory burden.

In determining how much is enough, it is helpful to first determine what Congress had in mind when it referred to an "assurance of confidentiality." We believe it clearly could not have been thinking of an assurance that the information supplied would not be disclosed beyond the FBI. Because an absolute assurance against use would be inconsistent with the government's obligations under *Brady* and the Federal Rules of Criminal Procedure and would, in any event, render the information virtually worthless to the FBI, such assurances must be exceedingly rare, if indeed they exist at all. We are therefore confident that Congress had a less sweeping assurance in mind. Rather, it seems far more likely that Congress



had in mind an assurance that the FBI would not directly or indirectly disclose the cooperation of the interviewee with the investigation unless such a disclosure is determined by the FBI to be important to the success of its law enforcement objective.

The issue for decision is thus whether the fact that the source supplied information to the FBI in the course of a criminal investigation is alone sufficient to support an inference that the source probably had a reasonable expectation that no unnecessary disclosure of his or her cooperation would occur. This, we believe, is a close question.[4] After all, the FBI is generally known to involve itself only in significant criminal matters and this means that in any FBI investigation, there are likely to be persons who have motives for resenting those who cooperate with it.[5]

---

[4] If one were to answer this question in the affirmative, one might still insist on a more specific record than we have before us in this case. That record, for example, does not affirmatively reflect that the interviewees knew their interviewer was an FBI agent and knew the purpose for which the information was sought. While we can appreciate that insurmountable recordkeeping problems might be created by a requirement that the overall circumstances of each interview be included in the FBI affidavit, it is not apparent to us why some representation could not be made on this score based on the agents' notes or consistent FBI practice.

[5] Moreover, while the FBI has made a deliberate decision in this case to rely solely on the fact that the withheld information is the product of FBI interviews, the issue becomes even closer when one adds to the equation other background facts which do not concern what went on at the time of a particular interview. We know, for example, that the criminal investigation involved in this instance was one concerning the shooting of a policeman and that the crime and investigation received a great deal of publicity, including media reports that a motorcycle gang was suspected of having been involved. In

On the other hand, we acknowledge that there are undoubtedly many routine FBI interviews in the course of criminal investigations that are unlikely to give rise to similar apprehensions on the part of the interviewee. In light of the disparate nature of FBI interviews, a record like the one before us arguably permits nothing more than speculation as to whether a particular interview was conducted on a confidential basis.

Our panel need not resolve this difficult issue here, however, because we do not write on a clean slate. In *Lame v. United States Department of Justice*, 654 F.2d 917, 929 (3d Cir.1981) (*"Lame I"*), we were confronted with a situation virtually identical to that now before us. Because there have been no intervening teachings of the Supreme Court that require our departure from that precedent, our disposition of this case must be the same as the one there reached. Internal Operating Procedure 9.1.

In *Lame*, the requester sought FBI 302 forms for named individuals whose identities he had discovered from public records of a much publicized federal prosecution of two members of the Pennsylvania legislature. A 302 form is used by the FBI to record the substance of an interview with a potential witness. The FBI refused even to confirm or deny the existence of the designated 302s because confirmation without more would disclose that the named individuals had cooperated with the FBI. The FBI first filed an affidavit by a special agent who "asserted that in-

---

this context, one might more readily infer that the source would not have gotten involved absent an assurance that his cooperation would not be indiscriminately disclosed. As we shall see, this background information does not distinguish our case from the *Lame* case where well-known and powerful people were the subjects of the investigation.



dividuals who furnish information to the FBI do so with the understanding that the information given by them and their relationship with the agency will be held in the strictest confidence." *Id.* at 925. The FBI later submitted an *in camera* affidavit and representative 302s, asserting, *inter alia*, that in order to obtain the interviews "assurance, either express or implied, had been given to the interviewees that there would be no indiscriminate release to the public of their identities." *Id.* at 920.

This court agreed with the FBI that it was justified in resorting to an *in camera* affidavit and indicated that there would be no problem with the FBI's position if its *in camera* affidavit had been sufficiently detailed. We concluded, however, that the *in camera* affidavit was insufficient for purposes of Exemption 7(D):

> Whether there is an expressed or an implied assurance of confidentiality is a question of fact to be determined in regard to each source.
>
> * * * * *
>
> [T]he Section 7(D) confidential source exemption requires that an assurance of confidentiality be found for each source. Thus, the district court, in order to find that such assurances, express or implied, were given, had to have been furnished with detailed explanations relating to each alleged confidential source.

*Id.* at 923, 928.

In *Lame*, we reached our conclusion regarding Exemption 7(D) reluctantly, voicing our dual concerns that our holding (1) would unduly tax limited FBI resources and (2) might discourage future cooperation with the FBI. We concluded, however, that

it was for Congress, rather than this court, to "attempt to accommodate the[se] concerns." *Id.* at 929.

For reasons that we have heretofore explained, we find no necessary inconsistency between *Lame's* insistence that the existence of an implied assurance of confidentiality is a question of fact to be determined for each source and the results reached by the numerous courts of appeals that have inferred an assurance of confidentiality from the fact that information was obtained in an FBI interview during a criminal investigation. Nevertheless, we believe *Lame*, fairly read, contemplates a showing by the government of the particular circumstances of an interview or source. Clearly the record before us is indistinguishable from the record before the court in *Lame*, and the *Lame* court held the record before it to be insufficient to support a finding of confidentiality. Accordingly, we conclude that *Lame* requires this panel to affirm the judgment of the district court with respect to Exemption 7(D).

The FBI argues that given *Reporters Committee*, we are no longer bound by *Lame*. First, it contends that the Supreme Court found that the 1986 FOIA amendment reflects a general congressional desire to ease the government's burden under Exemption 7. Second, the FBI maintains that the Supreme Court intended the categorization process it adopted for Exemption 7(C) cases to be utilized in the context of other exemptions. While there is language in *Reporters Committee* that may be a harbinger of a general easing of the government's FOIA burden, there is nothing of sufficiently direct import for Exemption 7(D) jurisprudence to warrant this panel's ignoring the holding of the panel in *Lame*.

Before the 1986 amendment, Exemption 7(D) provided that an agency could withhold information



compiled for law enforcement purposes if production "would disclose the identity of a confidential source." The amendment substituted the phrase "could reasonably be expected to" for the word "would." This change speaks to the degree of risk of confidential source disclosure Congress was willing to accept. It says nothing about what Congress means by "confidential source."

The Supreme Court's approval of a categorical approach to an Exemption 7(C) case similarly tells us nothing new about the meaning of "confidential source" under Exemption 7(D). Prior to *Reporters Committee*, the understanding had been that the weighing of privacy interests and public interest required by Exemption 7(C) was to be done on a case-by-case basis. In that case, the Supreme Court indicated that where it could be said of a category of documents, as of FBI rap sheets, that "the balance characteristically tips in one direction," case-by-case balancing is not required and documents within that category may be declared exempt. *Reporters Comm.*, 489 U.S. at 776, 109 S.Ct. at 1483. While the Court's opinion suggests that a similar categorical approach may appropriately be substituted for "case by case balancing" under exemptions other than 7(C), determining what constitutes a "confidential source" and what constitutes a *prima facie* showing of a "confidential source" does not involve "case by case balancing."

Finally, the FBI argues that we should sustain its position because it tendered its entire files to the district court for *in camera* inspection. We decline to hold that the government can sustain its burden in this manner. While it is clearly appropriate for an agency to so tender its files, it cannot through such a tactic require the court to do its homework for it.

In *Lame v. United States Department of Justice*, 767 F.2d 66 (3rd Cir.1985) *Lame II*, the government's position was sustained because it submitted not only the 302 forms for *in camera* inspection but also an *in camera* affidavit providing the court with the details found wanting in *Lame I*.[6]

III.

In the ten years since this court decided *Lame I*, six other courts of appeals have reached decisions that are in tension, if not in direct conflict, with the view we there took of what constitutes a *prima facie* showing under Exemption 7(D). Nevertheless, we find this case indistinguishable from *Lame I*, and as a panel, are not at liberty to depart from prior circuit precedent. Accordingly, we will affirm that portion of the district court's judgment which directs production of material withheld solely on the basis of Exemption 7(D). We will reverse that portion of the judgment, however, to the extent it orders production of material withheld in reliance on Exemption 7(C). On remand, the district court will enter a new judgment implementing the decisions we have here reached.

---

[6] The FBI urges that if we find *Lame I* to be controlling, we nevertheless hold that the district court erred in not giving the FBI a further opportunity to file *in camera* affidavits in an attempt to justify its position. Particularly in light of the instruction provided by the opinion in *Lame I* and *II*, we cannot say the district court abused its discretion in ordering production without giving the FBI yet another chance.



**APPENDIX B**

UNITED STATES DISTRICT COURT
D. NEW JERSEY

---

Civ. A. No. 90-1953

VINCENT JAMES LANDANO, PLAINTIFF

*v.*

U.S. DEPT. OF JUSTICE, ET AL., DEFENDANTS

---

Nov. 29, 1990

OPINION

SAROKIN, District Judge.

Plaintiff, Vincent James Landano moves, pursuant to Fed.R.Civ.P. 56, for summary judgment in his action to compel the Federal Bureau of Investigation ("FBI") to release without redactions FBI information he requested pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The FBI cross-moves for summary judgment against plaintiff, claiming that its decision not to release certain information to plaintiff, and to release with redactions other requested information comports with certain statutory exceptions to FOIA. For the reasons given below, this court declares plaintiff's motion for summary judgment moot, partially grants defendant's cross-motion for summary judgment and partially

denies defendant's cross-motion for summary judgment.

INTRODUCTION

By promulgating the Freedom of Information Act ("FOIA"), Congress sought to "open agency action to the light of public scrutiny." *Department of the Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1975). It did not intend to provide individual citizens with information about their fellow citizens for their own self-interested use. Yet the mere fact that an applicant possesses a substantial self-interest in the information does not disqualify him or her from requesting that information.

In this case, plaintiff claims that the FBI maintains in its files information which exculpates him from a murder for which he was convicted and may inculpate someone else; and that such information was systematically withheld from him and his counsel during his prosecution. Plaintiff's right to information that establishes his innocence and the public's interest in assuring that the innocent are not wrongfully convicted and confined furthers the policy concerns which engendered the statute. Where a person convicted of a serious crime can demonstrate, as petitioner has done here, that the prosecution possessed and concealed information which might have lead to petitioner's acquittal, such person and the public should be entitled to examine that information and the reasons and policies surrounding its concealment.

The court believes that the privacy interests and agency concerns expressed by the government can be protected by appropriate redactions, while petitioner and the public are afforded the opportunity for the scrutiny which the statute contemplates. The court does not mean to suggest that following every conviction a criminal defendant shall be entitled to review the entire investigative file. A substantial showing must be made, as has been made here, demonstrating a pattern of conduct which has severely prejudiced the plaintiff's rights, and thus the fairness and integrity of the criminal justice system itself.



The court rejects the government's offer for an *in camera* inspection by the court. Despite the court's familiarity with this matter and the contentions of plaintiff, the court is convinced that no impartial reviewer can examine these files with the same knowledge, intensity, and interest as plaintiff and his counsel. Matters of substantial significance could easily elude the court or anyone designated by the court to perform this task.

Finally, the court is concerned at the strident position taken by the United States Attorney in this matter, gratuitously disparaging the plaintiff's protestations of innocence.[1] The court makes no finding of wrongdoing on the part of the FBI in this matter, and the government is justified, and indeed required,

---

[1] In belittling plaintiff's argument in this case, the government's brief in favor of its cross-motion for summary judgment states:

> The United States is as concerned about the interests of justice as is plaintiff, and defendants would not thwart production of documents if the law did not absolutely preclude production of documents sought by plaintiff, *especially in the extremely unlikely event plaintiff is innocent of the charges of which he was convicted. However, we cannot help but wonder, as should this court, about plaintiff's credibility in light of his recent false assertions of FBI wrongdoing . . . which cannot help but color one's view of plaintiff's credibility on his claims of innocence as well.*
>
> U.S. Government's brief in favor of its Cross-Motion for Summary Judgment, at 23.

to defend the agency and the integrity of its files. However, if there is evidence existing in those files which proves or tends to prove Mr. Landano's innocence, the government should be volunteering it rather than resisting its disclosure. Law enforcement agencies have as much of a duty to protect, and if necessary, free the innocent, as they do to convict and punish the guilty. The resistance to disclosure of information in this matter is not a testament to a system intent on seeking the truth and dispensing justice.

## BACKGROUND

On August 13, 1976, two gunmen robbed the Hi-Way Check Cashing Service in Kearney, New Jersey. During the robbery, one of the gunmen shot and killed Newark Police Officer, John Snow. A Hudson County grand jury indicted plaintiff and three other men, Allen Roller, Victor Forni, and Bruce Reen, for felony murder and other crimes stemming from the robbery, and on May 17, 1977, plaintiff was convicted of felony murder and other crimes associated with the robbery.

During the thirteen years since his conviction, plaintiff has maintained that he is innocent of the charges, and that the Hudson County prosecutor withheld significant exculpatory evidence from him and his counsel in an effort to convict him for a crime which he did not commit. After Raymond Portas, a key witness for the prosecution, recanted his trial testimony in which he originally stated that he saw plaintiff driving the getaway car used in the robbery, plaintiff filed a petition for habeas corpus with this court, claiming that his due process rights to a fair trial were infringed by the admission of Portas' identification testimony. After conducting an evidentiary hearing, this court was convinced that Portas' recantation was believable. However, it reluctantly denied plaintiff's petition, recognizing that it was bound by the state trial court's prior finding that Portas' recantation was incredible. *Landano v. Rafferty*, 670 F.Supp. 570 (D.N.J.1987), *aff'd*, 856 F.2d 569 (3d Cir. 1988), *cert. den.*, 489 U.S. 1014, 109 S.Ct. 1127, 103 L.Ed.2d 189 (1989). On June 27, 1989, however, this court issued a conditional writ of habeas corpus in response to plaintiff's motion for relief from its prior judgment, pursuant to Fed.R. Civ.P. 60(b), basing the ruling on its finding that the state prosecutor had suppressed exculpatory information during plaintiff's criminal trial. *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J.1989). The Court of Appeals for the Third Circuit reversed this court's decision, holding that plaintiff had not exhausted his state law remedies with respect to that particular claim for post-conviction relief. *Landano v. Rafferty*, 897 F.2d 661 (3d Cir.1990), *cert. den.*, —— U.S. ——, 111 S.Ct. 46, 112 L.Ed.2d 23 (1990).

On September 30, 1988, plaintiff sent a letter to the FBI's Newark Field Office requesting all FBI information pertaining to the murder of Police Officer Snow (FOIA Request No. 310265, "Snow Request"). On May 8, 1990, 19 months later, the FBI responded by releasing to plaintiff redacted portions of its Snow investigative file. The FBI provided plaintiff with 324 pages of the 726 page file. Names and substantial passages were deleted from many of the pages supplied.

On January 10, 1989, plaintiff sent a letter to the FBI requesting its file on Victor Forni (FOIA Request No. 306424, "Forni Request"). On June 22, 1990 the Department of Justice ("DOJ") informed plaintiff's attorney that the FBI was precluded from

fulfilling plaintiff's Forni Request under the Privacy Act, 5 U.S.C. § 552a(b)(2) and FOIA, 5 U.S.C. § 552(b)(7)(C), and that plaintiff could not receive the requested file unless Mr. Forni authorized the release of such information.

Plaintiff appealed to the DOJ both the FBI's decision to send him a redacted version of its Snow file and its decision not to send him its Forni file. Because the DOJ has affirmed both FOIA request decisions, this court now has jurisdiction over this dispute. Since oral argument in this case, Victor Forni has authorized the release of his FBI file to plaintiff, rendering the controversy concerning the Forni request moot. This court will thus only rule upon plaintiff's Snow request in this opinion.

## DISCUSSION

In order for a party to prevail on its motion for summary judgment, it must show that there are no genuine issues of material fact and that, viewing the facts in the light most favorable to the non-moving party, it will prevail on its claims as a matter of law. Fed.R.Civ.P. 56; *See Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Wisniewski v. Johns-Manville Corp.*, 812 F.2d 81, 83 (3d Cir.1987). There are no genuine issues of material fact in this case. Plaintiff and defendant agree that the FBI sent plaintiff a redacted version of its Snow file. While defendant and plaintiff disagree as to the extent of the FBI's involvement in the withholding of exculpatory evidence from plaintiff at his criminal trial, both parties acknowledge that the FBI was involved in the investigation which resulted in plaintiff's prosecution and conviction.

Given the dearth of factual disputes in this matter, the threshold question before this court is whether



defendant has sufficiently justified its redactions and deletions of the Snow file. When adjudicating the withholding of information under FOIA, district courts must determine the matter *de novo*, requiring the defendant to bear the burden of proving that the information not released by defendant comes within a statutory exemption. § 552(a)(4)(B); *King v. Dept. of Justice*, 830 F.2d 210, 217 (D.C. Cir.1987). Courts reviewing FOIA requests must also give effect to the statute's strong presumption in favor of releasing requested documents. *I.E.B.W. Local No. 5 v. U.S. Dept. of HUD*, 852 F.2d 87, 89 (3d Cir.1988).

In *Vaughn v. Rosen*, 484 F.2d 820, 826-28 (D.C. Cir.1973), *cert. den.*, 415 U.S. 977, 94 S.Ct. 1564, 39 L.Ed.2d 873 (1974), the Court of Appeals for the District of Columbia required federal agencies to describe and index withheld information, in an effort to avoid shifting the burden of proof in FOIA request cases from defendant to plaintiff. A *Vaughn* index describes with particularity the withheld information and identifies the FOIA exceptions that apply to that information, insuring that the plaintiff does not have to argue for the release of withheld information without knowing generally its nature and relevance to the professed FOIA exemptions. As the court in *King v. U.S. Dept. of Justice*, 830 F.2d 210 (D.C. Cir.1987) stated, "when an agency seeks to withhold information, it must provide a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of the withheld document to which they apply." *Id.* at 219. In its supporting affidavit, defendant enumerated those FOIA exemptions that it contends cover the withheld material in this case. Superneau Aff., at 13. Where whole pages were withheld from plaintiff, defendant

supplied an index describing in general terms the withheld material and stipulating the applicable FOIA exceptions. Where material was deleted on a released page, defendant specified what it considered the appropriate FOIA exception alongside the indicated deletion.

In its affidavit, defendant claimed that the redactions and deletions of the Snow file are permissible under exemptions 552(b)(2), (b)(6), (b)(7)(C), and (b)(7)(D) of FOIA. This court will now examine defendant's contentions respecting these exemptions.

Section 552(b)(2) exempts from mandatory disclosure records "related solely to the internal practices of an agency." The FBI asserted exemption (b)(2) to withhold symbol numbers of confidential informants. The withholding of symbol numbers and file numbers has been upheld as a legitimate application of exemption (b)(2). *Branch v. FBI*, 658 F.Supp. 204, 208 (D.D.C.1987). Because this court agrees that the interests weigh in favor of withholding the symbol numbers of confidential informants in this case, and that little public interest in the internal symbol and file numbers of the FBI exists, it affirms the FBI's decision to do so.

Section 552(b)(6) allows the government to withhold information about individuals in "personnel and medical files and similar files" where the disclosure of such information "would constitute a clearly unwarranted invasion of personal privacy." Defendant contends that it withheld individual criminal history or rap sheet information pursuant to (b)(6), labeling such information "similar files" under the exemption. In light of the Supreme Court's ruling in *Dept. of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103



L.Ed.2d 774 (1989), that rap sheet information can be withheld pursuant to exemption (b)(7)(C), this court considers as protected from disclosure any rap sheet information in the Snow file. However, this court considers such information protected only under (b)(7)(C) and not, as asserted by defendant, under (b)(6). If defendant withheld any other information pursuant to (b)(6), it must specify its nature to this court so that it can determine by proper balancing whether such information was properly withheld under that exemption.

Section (b)(7)(C) allows the government to withhold certain personal information in law enforcement records. The statute sets out the exemption as follows:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

In reliance on exemption 7(C), the FBI withheld the names of special agents, FBI support employees, police officers, and other third parties to the Snow investigation, including witnesses. It also withheld the initials of FBI employees.

To satisfy the requirements for exemption 7(C), defendant must show that the withheld information consists of "law enforcement records", and that an invasion of privacy could reasonably result from its disclosure. In this instance, records responsive to plaintiff's FOIA request were compiled during the investigation of a bank robbery involving the death of an individual. The FBI was authorized to compile the information under 18 U.S.C. § 2113, Bank Robbery and Incidental Crimes. In view of defend-

ant's authority to gather the information, this court finds that it was compiled for law enforcement purposes.

The second requirement in applying exemption 7(C) is to determine whether disclosure of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." The legislative history of exemption (7) demonstrates a congressional intent to protect the privacy rights of persons other than the subject of the investigation. As its author, Senator Hart explained.

> [It] is intended to protect the privacy of any person who is mentioned in the requested files, and not only the person who is the subject of the investigation. Cong.Rec. 17033 (May 30, 1974).

Where an individual mentioned in the withheld information has a cognizable interest in privacy, the court must determine whether to release that information by "weigh[ing] . . . the public benefit which would result from the disclosure against the privacy interest and the extent to which it is invaded." *Patterson by Patterson v. F.B.I.*, 893 F.2d 595, 601 (3rd Cir.), *cert. denied*, *Patterson v. F.B.I.*, —— U.S. ——, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990), (quoting *Cuccaro v. Secretary of Labor*, 770 F.2d 355, 359 (3d Cir.1985)).

In FOIA request cases, certain types of information may, as a matter of law, be withheld from an applicant under what the Supreme Court has called "categorical balancing". In *Reporter's Committee*, the Supreme Court sanctioned the practice of categorical balancing under exemption 7(C) and other exemptions while holding that all rap sheet information not requested by its subject is exempt from FOIA disclosure under exemption 7(C). "[F]or an



appropriate class of law-enforcement records or information", stated the court, "a categorical balance may be undertaken." *Reporter's Committee*, supra 109 S.Ct. at 1484. "Categorical decisions may be appropriate and individual circumstances disregarded", declared the court, "when a case fits into a genus in which the balance characteristically tips in one direction." *Id.* 109 S.Ct. at 1483. In delineating the requirements for categorical balancing, the Supreme Court stated:

> If it is always true that the damage to a private citizen's privacy interest from a rap sheet's production outweighs the FOIA-based public value of such disclosure, then it is perfectly appropriate to conclude as a categorical matter that production of such [rap sheets] could reasonably be expected to constitute an unwarranted invasion of personal privacy. *Id.* 109 S.Ct. at 1484.

Such guidelines compel this court to uphold defendant's withholding of the names of FBI informants or FBI undercover agents. Because their names are not made available to the public through other channels, it is reasonable to expect that such individuals would have a stronger privacy interest than others whose names may be disclosed irrespective of any FOIA request. Moreover, policy concerns dictate that persons who have supplied information to investigative personnel in confidence should not have to risk harassment or retaliation as a result of their cooperation. *See Dow Jones & Company, Inc. v. Dept. of Justice*, 908 F.2d 1006, 1011 (D.C.Cir. 1990). Disclosing the names of FBI undercover personnel and informants could subject such persons to retaliation and other dangers unique to the work they perform for the FBI. *See King v. U.S. Dept. of*

*Justice*, 830 F.2d 210, 232-33 (D.C.Cir.1987). In acordance with the requirements of *Reporter's Committee*, this court finds that the disclosure of the names of FBI undercover agents or FBI informants could reasonably be expected to constitute an unwarranted invasion of personal privacy, and that the FOIA-based public value in the information, though significant, will generally not outweigh the damage to the privacy of the individuals mentioned in the information. This court therefor upholds defendant's withholding of such information. However, even though, presumptively, undercover agents and informants are entitled to protection, a plaintiff may establish that the need for the disclosure of such information outweighs the privacy rights of such individuals. The burden in such instances should be cast upon the plaintiff to establish that such invasion of personal privacy is warranted by the particular circumstances presented. *See Dow Jones*, 908 F.2d at 1011.[2]

This court does not accept defendant's contention that the names of witnesses or other FBI and law enforcement personnel should be withheld from plaintiff under exemption 7(C). The identities of many of these persons are routinely made known to the public through other channels, the specter of harassment

[2] This court agrees with the D.C. Circuit that a presumption of non-disclosure should exist with respect to the identities of confidential FBI informants. However, this court does not consider such presumption "irrebuttable", in practical terms, as the D.C. Circuit has characterized it in the *Dow Jones* opinion. Unlike the court in *Dow Jones*, this court holds that a court may consider proofs other than evidence that the informant did not manifest a regard for confidentiality during the initial disclosure of information as evidence that could overcome the presumption against disclosure.



or retaliation does not seem as eminent for these individuals, and nothing presented by defendant in this matter convinces the court that they as a group possess privacy interests compelling enough to satisfy the standard for categorical nondisclosure announced in *Reporter's Committee*. For this category of information, the burden should remain with the government to establish that disclosure is an unwarranted invasion of personal privacy.

Having rejected defendant's assertion that the names and initials of FBI and law enforcement personnel other than undercover FBI personnel and FBI informants may be categorically withheld under *Reporter's Committee*'s categorical balancing standard, this court must now determine whether the circumstances and exigencies of the Snow investigation compel non-disclosure of such information in this particular case. In setting forth the considerations of this contextualized, as opposed to categorical, balancing approach in *Stern v. F.B.I.*, 737 F.2d 84 (D.C. Cir.1984), the Court of Appeals for the D.C. Circuit, a court highly experienced in FOIA request cases, declared that the 7(C) balance:

> must be applied to the specific facts of each case. Because the myriad of considerations involved in the Exemption 7(C) balance defy rigid compartmentalization, per se rules of nondisclosure based upon the type of document requested, the type of individual involved, or the type of activity inquired into, are generally disfavored. A particular record may be protected in one set of circumstances, but not in others. *Id.* at 91 (citing *Bast v. Dept. of Justice*, 665 F.2d 1251, 1254 (D.C.Cir.1981).

In *Keys v. U.S. Dept. of Justice*, 830 F.2d 337 (D.C. Cir.1987), the D.C. Circuit opined that "[a] com-

partmentalization is 'rigid' within the meaning of *Stern* only to the extent that it ignores factors that are material, or gives undue weight to factors that are of little or no relevance." *Id.* at 347.

Adopting the spirit of these cases, this court finds that defendant has not proffered any evidence to this court that justifies the withholding of the names of the remaining law enforcement personnel or witnesses cited in the Snow file. Defendant's affidavit covers generally the potential dangers in releasing the names of FBI support personnel and police officers, and this court acknowledges that in many instances, withholding such information may be justified. Yet defendant offers nothing to convince the court that the dangers involved in releasing such information exist in this particular case, particularly in view of the approximately 14 years which has elapsed since the underlying investigation. With respect to those witnesses or law enforcement personnel not covered by categorical balancing, defendant does not distinguish between persons who would be endangered by disclosure and those who would not. Defendant does not consider the effect that the passage of time has had on the privacy interests of the named individuals, and does not indicate whether persons initially thought to have been covered by exemption 7(C) have died or have already been exposed in other fora to the public.

Under section (b)(7)(D), records or information are properly exempted from disclosure when such disclosure:

> . . . could reasonably be expected to disclose the identity of a confidential source, . . . and in the case of a record or information complied by a criminal law enforcement authority in the course



> of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source . . .

The government claimed the exemption under section (b)(7)(D) to protect sources of information identified in its bank robbery investigation, including information obtained from non-federal law enforcement agencies, information that the FBI believed could reasonably be expected to disclose the identity of an FBI source, information from confidential FBI sources, and certain FBI symbol source number information. As mentioned above, this court finds that FBI symbol source numbers are properly protected under (b)(2), See *Branch*, 658 F.Supp., *supra* at 208. For many of the reasons given for withholding identifying information about certain confidential witnesses and FBI undercover agents, this court also holds that the categorical balancing approach announced in *Reporter's Committee* allows the withholding of bank robbery investigation information that could reasonably be expected to disclose the identity of a confidential FBI source or undercover agent. With respect to all other information withheld by defendant under (b)(7)(D), the court requires case-specific reasons for non-disclosure which were not supplied by defendant. Accordingly, any other information withheld by the government under exemption 7(D) must be released to plaintiff.

As stated above, in assessing defendant's reasons for withholding the redacted information, this court has not reviewed the unredacted Snow file *in camera*, although it possesses the powers to do so under § 552 (a)(4)(B). This court realizes that the *in camera* review provision of FOIA furthers Congress' obvi-

ous interest in insuring that government agencies conduct "good faith" responses to FOIA requests and do not unfairly withhold information from the public. See *Patterson*, 893 F.2d at 600. Yet cases have acknowledged that "in the ordinary case, a *Vaughn* index correlating justifications for non-disclosure with the particular portions of the documents requested will generally suffice to narrow the disputed issues and permit a reasoned disposition by the district court." *Patterson, supra*, at 599; *Lame v. U.S. Dept. of Justice*, 654 F.2d 917, 922 (3d Cir.1981). It is thus reasonable for a court to expect a *Vaughn* index and accompanying affidavit to set forth the ways in which the statutory exemptions apply to the particular FOIA request at issue. District courts should not have to conduct an *in camera* review of withheld information every time they need to determine whether the circumstances of the particular case warrant the government's exercise of a FOIA exemption. Furthermore, the infirmities of an *in camera* review discussed above renders its availability insufficient to satisfy the needs and policies of the statute in many, if not most, cases.

CONCLUSION

Under the FOIA, the public's right to disclosure of information has been broadly defined and its exemptions narrowly construed. Doubts are to be resolved in favor of disclosure. The basic purpose of the statute is to protect the people's right to obtain information about their government and to expose to the light of day agency conduct and practices. Those goals must be balanced against needs in certain areas to protect confidential information and individual privacy rights.



The need for privacy is at its highest pinnacle in connection with criminal investigations. Those who come forward with information and those against whom the information is submitted are entitled to a high threshold of protection. That threshold can be exceeded, however, when the need for disclosure exceeds the need for privacy—where the public interest in obtaining information outweighs the private or agency interest in concealing it. In balancing those interests, it is difficult to envision that information which might serve to free a person wrongly convicted of murder should remain concealed in order to protect someone's identity or right of privacy.

For the foregoing reasons, this court grants defendant's cross-motion for summary judgment as to all FBI symbol source and file numbers, symbol numbers of confidential FBI informants, individual rap sheet information mentioned in defendant's Snow file, names of FBI informants or FBI undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information. This court considers such information properly protected in this instance under the proffered exemptions, subject to a particularized showing that such protection is unwarranted. With respect to other information withheld by defendant, including the names of witnesses, FBI support personnel, FBI personnel that do not work undercover, and other law enforcement personnel not covered by this court's interpretation of categorical balancing, this court concludes that the govenment failed to proffer evidence that supports the withholding of such information under the exemptions to FOIA in this particular case. As to these categories, it is the burden of the government to establish that such disclosure constitutes an unwarranted invasion of privacy.

## APPENDIX C

UNITED STATES DISTRICT COURT
D. NEW JERSEY

---

Civ. A. No. 90-1953

VINCENT JAMES LANDANO, PLAINTIFF

*v.*

U.S. DEPT. OF JUSTICE, ET AL., DEFENDANTS

---

Feb. 28, 1991

---

### AMENDED OPINION

SAROKIN, District Judge.

Defendant Federal Bureau of Investigation ("FBI") moves, pursuant to Fed.R.Civ.P. 59(e), for reconsideration and/or clarification of the court's November 29, 1990 decision and December 13, 1990 order. Defendant also moves for a stay of the court's December 13, 1990 order pending appeal of the court's decision or, in the alternative, for an extension of the time set for the production of documents. For the reasons which follow, this court grants defendant's motion for reconsideration and clarifies its previous opinion as follows:

### INTRODUCTION

On its motion for reconsideration, the government presents the following syllogism: (1) all information conveyed to the FBI during the course of a



criminal investigation is furnished pursuant to an express or implied promise of confidentiality; (2) based upon such express or implied promise neither the source nor the content of 'he information received from such source may be disclosed; (3) therefore, all information gathered by the FBI from any source during a criminal investigation is exempt from disclosure under exemption 7(D) of FOIA. Neither the statute nor any binding judicial interpretation of it supports this contention.

A person is a confidential source if she or he provided information under an express assurance of confidentiality or under circumstances from which an assurance of confidentiality could be reasonably inferred. *See Lame v. United States Dept. of Justice*, 654 F.2d 917, 923 (3d Cir.1981). Whether such an express or implied assurance of confidentiality was made is a question of fact to be determined in regard to each source. In this Circuit, the *per se* rule or presumption suggested by the government does not exist. To find as the government contends would totally eviscerate the statute and its policy and purpose. Only if there is a finding supported by competent evidence that a source is confidential does that source and all information provided by it become exempt from the disclosure requirement of FOIA. *See Lame, id.* The Court is entitled to receive and review detailed information as to each alleged confidential source. The blanket and generic exemption sought by the government is without support and defeats the policy of public exposure which prompted the statute in the first instance.

As to the judicial balancing required under exemption 7(C), the government suggests that "clearing one wrongly convicted" is not of sufficient public interest to even consider whether it warrants an inva-

sion of an informant's right of privacy. By so arguing, the government continues to misconstrue and trivialize what this court has found to be a substantial public interest. As stated in this court's earlier opinion:

> Where a person convicted of a serious crime can demonstrate, as petitioner has done here, that the prosecution possessed and concealed information which might have lead to petitioner's acquittal, such person and the public should be entitled to examine that information *and the reasons and policies surrounding its concealment. Landano v. Dept. of Justice*, 751 F.Supp. 502, 503 (1990) (emphasis added).

The government may believe that a policy of concealing exculpatory information, resulting in wrongful convictions is not a matter of public interest and concern. If so, all the more reason for the subject statute and the need to see beyond the government's representations and permit the public to form its own judgments.

Lastly, the court expresses its concern over the potential inconsistencies which could result from the differing approaches for determining whether information may be withheld under exemptions 7(C) or 7(D). Under the current case law, a court may determine that the FOIA-based public interest in disclosure of information outweighs the privacy interests of an individual informant and the extent to which that informant's privacy would be invaded, thus allowing disclosure under exemption 7(C). However, if the informant was a confidential source, the court may be required to uphold the government's nondisclosure of that same information under exemption 7(D). These potential inconsistencies may run



contrary to FOIA's overall policy of broad public disclosure.

## BACKGROUND

This dispute arises out of two requests for FBI documents under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 *et seq.*, plaintiff's September 30, 1988 request for information on the FBI's investigation of the murder of Police Officer Snow (FOIA Request No. 310265, "Snow Request") and plaintiff's January 10, 1989 request for information on Victor Forni (FOIA Request No. 306424, "Forni Request"). Because a thorough discussion of the history of this case appears in the court's November 29, 1990 opinion, the court will not repeat it here.

In its November 29, 1990 opinion and December 13, 1990 order, this court granted defendant's cross-motion for summary judgment and denied plaintiff's cross-motion for summary judgment with respect to the Snow file as to all FBI symbol source and file numbers, symbol numbers of confidential FBI informants, individual rap sheet information mentioned in defendant's Snow file, names of FBI informants or FBI undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information. The court also denied defendant's cross-motion for summary judgment and granted plaintiff's cross-motion for summary judgment with respect to the Snow file as to the names of witnesses in the Snow investigation, the names of FBI support personnel, and the names of other law enforcement personnel not covered by the court's interpretation of categorical balancing. In light of Mr. Forni's consent to the release of his FBI file, this court also partially granted plaintiff's motion for summary judgment on his Forni request, allow-

ing defendant to redact that file in a manner consistent with the court's opinion respecting the Snow file.

DISCUSSION

When adjudicating the withholding of information under FOIA, district courts must determine the matter *de novo*, requiring the defendant to bear the burden of proving that the information not released by defendant comes within a statutory exemption. § 552 (a) (4) (B); *King v. U.S. Dept. of Justice*, 830 F.2d 210, 217 (D.C.Cir.1987). Courts reviewing FOIA requests must also give effect to the strong presumption in favor of releasing requested documents. *I.E.B.W. Local No. 5 v. U.S. Dept. of Housing & Urban Development*, 852 F.2d 87, 89 (3d Cir.1988).

*Exemption 7(D)*

Defendant argues that this court erred in applying an exemption 7(C)-type balancing test to determine which information may be withheld from plaintiff under exemption 7(D). The court does not agree. In describing in its Summary Judgment brief the material withheld by the FBI under exemption 7(D), the government stated:

> The FBI claimed exemption 7(D) pursuant to plaintiff's Snow request to protect sources of information, including information obtained from non-federal law enforcement agencies, identified in the bank robbery investigation. Additionally, the FBI applied exemption 7(D) to information that could reasonably disclose the identity of a source (citations excluded) . . . Symbol source materials were also withheld under this exemption, as well as information obtained from confidential sources. Defendant's brief in support of summary judgment at 20-21.



Contrary to defendant's position, this court did not apply an exemption 7(C)-type balancing test to determine what information may be withheld under exemption 7(D). It merely inquired into whether defendant had properly justified the withholding of the information under exemption 7(D).

Under exemption 7(D), information and records are properly exempted from disclosure when disclosure:

> . . . could reasonably be expected to disclose the identity of a confidential source, . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source . . .

In *Cuccaro v. Secretary of Labor*, 770 F.2d 355 (3d Cir.1985), the Third Circuit reiterated the holding of that court in *Lame v. U.S. Dept. of Justice*, 654 F.2d 917 (3d Cir.1981) that "a person is a confidential source if he or she provided information under an express or reasonably implied assurance of confidentiality." *Cuccaro*, 770 F.2d at 360. The *Cuccaro* court also noted that "where an investigative agency relies upon information supplied by individuals who might suffer severe detriment were their identities disclosed, assurances of confidentiality may reasonably be inferred." *Id.*

In *Lame*, the court declared that "[w]hether there is an expressed or implied assurance of confidentiality

is a question of fact to be determined in regard to each source." *Lame*, 654 F.2d at 923. Despite shouldering the burden of proof as to the applicability of exemption 7(D) to the particular information withheld, defendant proffered no evidence to support its claim that persons protected by the FBI's withholding of information under exemption 7(D) were confidential sources. This circuit has not adopted the view proffered by defendant that promises of confidentiality are "inherently implicit" when the FBI solicits information. To do so would severely limit the breadth of agency disclosure available under FOIA. In limiting the government's power to withhold information in this case to that information which could reasonably be expected to disclose the identity of an undercover FBI agent or FBI informant, this court merely gave effect to the requirements set forth in *Cuccaro* and *Lame* and, in addition, determined that informational exchanges between the FBI and undercover FBI agents or FBI informants are subject to a presumption of confidentiality.

Defendant also argues that the court's opinion and order denied defendant the full protection of exemption 7(D) by not exempting from disclosure information from a confidential source that "would not reveal the identity of that [confidential] source." Defendant's brief, p. 3. Citing the D.C. Circuit's opinion in *Duffin v. Carlson*, 636 F.2d 709 (D.C.Cir.1980), the *Lame* court declared:

> Section 7(D) provides two protections. It protects from disclosure: (a) "the identity of a confidential source" and (b) for a criminal law investigation, "confidential information furnished only by a confidential source" . . . Once it has been determined that a source is confidential, all information that source has provided is exempt from disclosure under the second part of the exemption. *Lame*, 654 F.2d at 923-24.



This court agrees with defendant. Assuming that defendant can establish that a source is confidential, then the defendant may withhold all information from such sources. In other words, defendant may withhold under exemption 7(D) all information from those whom the court has determined to be confidential sources.

*Exemption 7(C)*

Defendant further argues that this court erred in its exemption 7(C) analysis. Exemption 7(C) allows the government to withhold:

> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

In reliance on exemption 7(C), "the FBI withheld the names of [s]pecial [a]gents, FBI support employees, police officers and other third parties. The FBI also withheld the initials of FBI employees." Defendant's brief in support of Summary Judgment, at 15.

Under the traditional balancing scheme applicable to exemption 7(C), where an individual mentioned in the withheld information has an interest in privacy, the court must determine whether to release that information by "weighing the public benefit

which would result from the disclosure against the privacy interest and the extent to which it is invaded." *Patterson by Patterson v. FBI*, 893 F.2d 595, 601 (3d Cir. 1990), *cert. denied, Patterson v. FBI*, —— U.S. ——, 111 S.Ct. 48, 112 L.Ed.2d 24 (1990) (quoting *Cuccaro*, 770 F.2d at 359.). In *U.S. Dept. of Justice v. Reporter's Committee for Freedom of the Press*, 489 U.S. 749, 109 S.Ct. 1468, 103 L.Ed.2d 774 (1989), however, the Supreme Court declared that "for an appropriate class of law enforcement records or information a categorical balance may be taken." *Id.* at 777, 109 S.Ct. at 1484. "Categorical decisions may be appropriate and individual circumstances disregarded", stated the court, "when a case fits into a genus in which the balance characteristically tips in one direction" *Id.* at 776, 109 S.Ct. at 1483.

Declaring that rap sheet information qualified for categorical balancing under exemption 7(C), the Supreme Court in *Reporter's Committee* stated:

> If it is always true that the damage to a private citizen's privacy interest from a rap sheet's production outweighs the FOIA-based public value of such disclosure, then it is perfectly appropriate to conclude as a categorical matter that production of such [rap sheets] should reasonably be expected to constitute an unwarranted invasion of personal privacy. *Id.* at 779, 109 S.Ct. at 1484.

Applying the categorical balancing approach announced in *Reporter's Committee* to this case, this court determined that the FBI properly withheld the names of FBI informants and FBI undercover agents. However, this court concluded that the other information withheld by defendant under exemption



7(C) was not the type of information envisioned by the Supreme Court when it promulgated its exception to the particularized balancing approach traditionally associated with exemption 7(C).

In its brief, the government urges that the identity of all persons (including FBI support personnel) giving and receiving information pursuant to the FBI's investigation should be exempt from disclosure under the categorical balancing approach adopted in *Reporter's Committee*. Under the government's interpretation of categorical balancing, however, the public might be able to learn of agency wrong-doing without being able to identify those committing it or with knowledge of it. Because this result would confound the purposes of FOIA, this court will not extend *Reporter's Committee* in the manner suggested by the government.

After concluding that the remaining information did not qualify for categorical balancing, the court then applied the traditional 7(C) balancing approach, weighing, as best it could given the limited information provided by the government, the FOIA-based public interest asserted in this case against the individual privacy interests and the invasion of individual privacy associated with disclosure.

Reaffirming the view it expressed in *Dept. of Air Force v. Rose*, 425 U.S. 352, 372, 96 S.Ct. 1592, 1604, 48 L.Ed.2d 11 (1975), the *Reporter's Committee* court declared that "whether disclosure of a private document under Exemption 7(C) is warranted must turn on the nature of the requested document and its relationship to the basic purpose of the Freedom of Information Act to open agency action to the light of public scrutiny . . . rather than on the particular purpose for which the document is being requested."

*Reporter's Committee*, 489 U.S. at 772, 109 S.Ct. at 1481. As stated above, this court's delineation of the FOIA-based public interest asserted in this case falls squarely within this definition. In challenging the court's delineation of the FOIA-based public interest, defendant mischaracterizes the court's analysis.

Framing the FOIA-based public interest in this case largely out of the factual findings of prosecutorial misconduct made in *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J.1989), this court stated:

> Where a person convicted of a serious crime can demonstrate, as petitioner has done here, that the prosecution possessed and concealed information which might lead to the petitioner's acquittal, such person and the public should be entitled to examine that information *and the reasons and policies surrounding its concealment. Landano v. Dept. of Justice*, 751 F.Supp. 502, 503 (emphasis added).

While not finding that the FBI had itself committed any wrongdoing, the court nonetheless recognized a FOIA-based public interest in this FOIA request on account of the investigative relationship between the ultimate prosecution of this matter and the FBI. This recognition of a FOIA-based public interest does not run afoul of *Patterson*.

In upholding the district court's granting of summary judgment against plaintiff under exemption 7(C), the *Patterson* court declared:

> In view of its finding that the FBI had not participated in any illegal conduct, the district court concluded that only a negligible benefit would inure to the public by releasing the names of FBI personnel. As a result of our independent examination of the documents, we find that the district court's conclusion is correct. *Patterson*, 893 F.2d at 601.



*Patterson* concerned the activity of one agency, the FBI, and documents the FBI held concerning its investigation of a child's request for information from various foreign countries. Even on those facts the court did not rule out the possibility that a FOIA-based public interest could be asserted. It only stated that, given no finding of illegal activity on the part of the FBI, any public benefit of disclosure would be "negligible" at best. Moreover, unlike the situation here, no specific finding of wrong-doing was made against any actor in *Patterson*.

The fact that the agency from whom the information has been sought is not guilty of any wrongdoing is not dispositive. Another agency may be the wrongdoer but the evidence may be found in the files of the "innocent" agency. For instance, the court offers the following hypothetical: The Environmental Protection Agency ("EPA") has investigated and recorded numerous instances in which large corporations have violated criminal environmental protection statutes by illegally polluting the environment. The EPA has passed this information on to the United States Attorney's Office in an effort to have these polluters prosecuted. Due to an illegal policy of not enforcing these environmental statutes against large corporations, the United States Attorney's Office refuses to prosecute the polluters. A newspaper reporter has reason to believe that the United States Attorney's Office is acting improperly by failing to prosecute the polluters. Under the government's interpretation of FOIA, that reporter would not be able to examine EPA files concerning the polluting cor-

porations because the reporter cannot establish any wrong-doing on the part of the EPA.

That the larger coordinated activity in this case is tainted by wrong-doing must bear on whether plaintiff has asserted a legitimate FOIA-based public interest in favor of disclosure. This court does not believe that *Patterson* contemplated a policy that would bar public disclosure of information from one actor in a tainted coordinated activity because that actor had not itself been found to have committed any wrong-doing. Such a result would seem especially harsh where, as here, the information sought may shed further light on the government's role in the tainted coordinated activity, may potentially exculpate an individual who has been convicted of murder, and may reveal a policy of concealment which should concern us all.

In view of the FOIA-based public interest recognized by this court, the time which has elapsed since the Snow and Forni investigations, the information already known about persons sought to be protected, and defendant's failure to enunciate one case-specific reason why any of the persons sought to be protected by the government have a compelling interest in nondisclosure, this court must adhere to its prior decision that the FOIA-based public interest in disclosure of the information outweighs the individual privacy interests in nondisclosure in this case.

*Defendant's Request for A Stay*

Defendant requests that this court stay its December 13, 1990 order pending appeal of this court's decision. In order to obtain a stay from this court, defendant must show a likelihood of success on the merits, irreparable injury absent a stay, that the



public interest requires that a stay should be granted, and that plaintiff will suffer no injury thereby. *Washington Metropolitan Transit Commission v. Holiday Tours*, 559 F.2d 841 (D.C.Cir.1977). As defendant has not convinced this court that it meets this standard, and plaintiff would suffer injury if a stay were granted, this court denies defendant's application for a stay. In addition, on account of the time that has elapsed since its last order, this court extends the time for document production as specified in the order that follows.

CONCLUSION

For the foregoing reasons, this court grants defendant's motion and clarifies its prior decision and order.

## APPENDIX D

## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

No. 91-5161

---

VINCENT JAMES LANDANO

*v.*

UNITED STATES DEPARTMENT OF JUSTICE; THE FEDERAL BUREAU OF INVESTIGATION, APPELLANTS

---

[Filed Apr. 14, 1992]

## SUR PETITION FOR REHEARING

Before: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, NYGAARD, ROTH, and ALDISERT, *Circuit Judges*

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for panel rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for



rehearing by the court in banc, the petition for rehearing is denied.

Judges Becker, Stapleton, Mansmann, Greenberg, and Hutchinson would have granted rehearing.

By the Court,

/s/ Walter K. Stapleton
Circuit Judge

Dated: Apr. 14, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45469

(2)

91-2054

No. _____

Supreme Court, U.S.
FILED
JUL 22 1992
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

October Term, 1992

UNITED STATES DEPARTMENT OF JUSTICE, et al.,

*Petitioners,*

v.

VINCENT JAMES LANDANO,

*Respondent.*

**Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF IN OPPOSITION

NEIL MULLIN
*Counsel of Record
NANCY ERIKA SMITH
ERIC R. NEISSER
SMITH, MULLIN & KIERNAN, P.C.
200 Executive Drive
Suite 155
West Orange, NJ 07052-3377
(201) 736-7033
*Attorneys for Respondent*
*Vincent James Landano*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED

Whether a court-created presumption that all persons who knowingly provide information to the FBI in the course of a criminal investigation do so under an implied assurance of confidentiality, for purposes of FOIA Exemption 7(D), 5 U.S.C. § 552(b)(7)(D), violates the requirement of 5 U.S.C. § 552(a)(4)(B) that federal agencies bear the burden of proof in justifying FOIA exemptions?

## PARTIES TO THE PROCEEDING

The Petition accurately sets forth the parties to this proceeding.



## TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTION PRESENTED | i |
| PARTIES TO THE PROCEEDING | ii |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| STATUTORY PROVISIONS INVOLVED | 1 |
| STATEMENT | 1 |
| REASONS FOR DENYING THE PETITION | 3 |
| CONCLUSION | 7 |

TABLE OF AUTHORITIES

Page

CASES:

*Dow Jones & Co. v. Department of Justice*, 917 F.2d 571 ..... 4, 7

*Keys v. U.S. Dept. of Justice*, 830 F.2d 337 (D.D. Cir. 1987) ..... 4, 5

*Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989) rev'd 897 F.2d 661 (3d Cir.) cert. denied 111 S.Ct. 46 (1990) ..... 3

*Schmerler v. FBI*, 900 F.2d 333 (D.D.C. 1990) ..... 4

STATUTE:

5 U.S.C. § 552(a)(4)(B) ..... 1, 7

The respondent, Vincent James Landano, respectfully requests that the Court deny the Petition for writ of certiorari seeking review of the Third Circuit's judgment in this case.

## OPINIONS BELOW

The Petition accurately sets forth the opinions below.

## JURISDICTION

The Petition properly invokes the jurisdiction of this Court.

## STATUTORY PROVISIONS INVOLVED

In addition to the provision cited by the petitioners, this matter involves 5 U.S.C. § 552(a)(4)(B) which provides in pertinent part as follows:

> (B) On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records . . . In such a case, the Court shall determine the matter de novo . . . and the burden is on the agency to sustain its action.

## STATEMENT

1. The respondent will not, at this procedural juncture, attempt to set forth facts supporting his position on

the merits. The purpose of this Statement is solely to set forth facts bearing upon reasons for denial of certiorari and to correct an important inaccuracy in the Petition.

2. Contrary to the FBI's representation, the Superneau declaration did not "discuss *in detail* the FBI's rationale for invoking . . . particular exemption[s] . . . " (Petition at 4) (Emphasis supplied) Importantly, the Superneau declaration is so lacking in detail that it fails to state whether any of the interviewees who provided information to the FBI were ever told (a) that they were speaking to FBI agents or (b) that they were being interviewed in furtherance of a criminal investigation. (App.[1], 25a, n.4 and text)

3. The FBI inaccurately minimizes its role in the John Snow murder investigation by stating that "Although the investigation was principally a state matter, the FBI became involved in part because of the need for interstate "unlawful flight" warrants to apprehend certain suspects." (Petition at 2, n.1) In fact, it is uncontroverted in the record below that the FBI, pursuant to an executive order, was actively involved in the *entire* John Snow murder investigation as part of a team of federal, state and local investigators and prosecutors that interviewed numerous witnesses, and gathered and analyzed physical evidence. (See respondent's Supplemental Appendix below at SA5 to SA13) The district court found "an investigative relationship between the ultimate prosecution of this matter and the FBI." (App., 58a) The district court adopted findings (App., 58a) it had made in

[1] The citation refers to the Appendix to the FBI's Petition.



another proceeding, *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989) rev'd 897 F.2d 661 (3d Cir.) cert. denied 111 S.Ct. 46 (1990) that the investigators and prosecutors in this case had engaged in misconduct justifying issuance of a writ of habeas corpus and determined that the public had a right to know, via FOIA, whether and to what extent the FBI participated in what the district court characterized as the "tainted coordinated activity" (60a) of the federal/state/local team that investigated and prosecuted the criminal case against Mr. Landano.

In sum, the district court found a substantial nexus between the FBI and the investigative/prosecutive activity of state and local authorities who violated Mr. Landano's rights.[2] That fact is relevant to Mr. Landano's cross-petition for certiorari. The legal implications of that nexus are discussed there.

## REASONS FOR DENYING THE PETITION

Respondent cannot, in candor, contest the FBI's claim that the Third Circuit's ruling reflects a split of authority among the circuit courts with regard to Exemption 7(D). Nor can respondent claim that the issue is not important. Indeed, if the FBI prevails here, as it has in various circuits, the FBI will, in effect, no longer be covered by FOIA. It is, after all, the FBI's position that any time any person or entity communicates with the FBI about any

[2] The Third Circuit, too, accurately states that "The FBI was involved, as were New Jersey state law enforcement officials, in the investigation of the murder." (App., 2a)

criminal matter they must be presumed to be confidential informants and their identities and *all* information they provide is exempt from public disclosure under Exemption 7(D), unless the FOIA applicant can overcome the presumption of confidentiality. Typically, the FOIA applicant will not know who or what the FBI is concealing and will therefore be unable to overcome any presumption of confidentiality. The District of Columbia Court of Appeals has candidly characterized the presumption the FBI seeks as nearly irrebuttable:

> We readily admit that the presumption we applied in *Keys [v. United States Dept of Justice,* 830 F.2d 337 (D.C. Civ. 1987)] and especially in *Schmerler [v. FBI,* 900 F.2d 333 (D.D.C. 1990)] in practical terms comes close to an irrebuttable one.

*Dow Jones & Co. v. Department of Justice,* 917 F.2d 571, 577.

Notwithstanding the split in the circuits and the importance of the issue, the record in this case is not adequate to properly present to this Court the issue posited in the Petition.

The Third Circuit concluded that the Superneau declaration, upon which the FBI rests its case, is so deficient that even if that Court had adopted the FBI's position – that anyone speaking to the FBI is presumed to have done so under an implied assurance of confidentiality – nevertheless the outcome of the case would have been the same because the FBI never even alleged that interviewees *knew* they were communicating with FBI agents



about a criminal investigation. The relevant text of the Circuit's opinion is as follows:

> The issue for decision is thus whether the fact that the source supplied information to the FBI in the course of a criminal investigation is alone sufficient to support an inference that the source probably had a reasonable expectation that no unnecessary disclosure of his or her cooperation would occur. This, we believe, is a close question.[4]

---

[4] If one were to answer this question in the affirmative, one might still insist on a more specific record than we have before us in this case. That record, for example, does not affirmatively reflect that the interviewees knew their interviewer was an FBI agent and knew the purpose for which the information was sought. while we can appreciate that insurmountable recordkeeping problems might be created by a requirement that the overall circumstances of each interview be included in the FBI affidavit, it is not apparent to us why some representation could not be made on this score based on the agents' notes or consistent FBI practice.

(App., 25a, n.4 and text)

The foregoing record deficiency is fatal to the FBI's Petition. The circuit decisions the FBI relies upon and asks this Court to approve, derive an implied assurance of confidentiality from the fact of interviewees *knowingly* speaking to the FBI. In *Keys v. U.S. Dept. of Justice,* 830 F.2d 337 (D.D. Cir. 1987) the Court stated that:

> [T]he circuits agree without dissent that courts should find an assurance of confidentiality *where it is reasonable to infer from the circumstances that its absence would impair the Bureau's ability to elicit the information.*

*Id.* at 345. (Emphasis supplied)

Obviously, the FBI's "ability to elicit information" from persons who do not *know* they are speaking to FBI agents, cannot be impaired by any court decision concerning the FBI and Exemption 7(D), whether for or against a presumption of confidentiality. Such unwitting interviewees cannot possibly perceive themselves as being the beneficiaries of an implied assurance that the FBI will keep their identity and information confidential. Because the FBI failed to assert in the Superneau declaration that the interviewees knew or were told they were being interviewed by the FBI in the course of a criminal investigation, this case does not factually pose the question raised in the Petition, to wit, whether a promise of confidentiality is "inherent whenever the FBI gathers information during a criminal investigation . . . " (Petition, I)

Thus, if this Court were to decide the only issue *factually* presented here – whether there is an implied assurance of confidentiality for purposes of 7(D) even when an interviewee does not know he or she is being interviewed by the FBI[3] – the split of authority in the Circuits would remain unresolved. Accordingly, this matter is not worthy of certiorari.

If this Court decides, nevertheless to grant certiorari, it should not certify the question as presented by the FBI. The Court of Appeals for the District of Columbia Circuit, unlike the FBI here, has candidly presented the issue as one concerning the existence of a presumption in favor of

[3] Respondent is not aware of any published opinions concerning this issue, the real issue posed factually by the underlying record.



the FBI that anyone speaking to the FBI does so under an implied assurance of confidentiality, for purposes of Exemption 7(D). *Dow, supra,* 917 F.2d at 577. Judge Edwards, concurring, expressed his opinion that such a presumption, given its irrebuttability as a practical matter, violates FOIA's requirement that "the burden is on the agency to sustain" the invocation of any FOIA exemption. 5 U.S.C. § 552(a)(4)(B).

Thus if certiorari is granted the following question, not the FBI's question, should be certified:

> Whether a court-created presumption that all persons who knowingly provide information to the FBI in the course of a criminal investigation do so under an implied assurance of confidentiality, for purposes of FOIA Exemption 7(D), 5 U.S.C. (b)(7)(D) violates the requirement of 5 U.S.C. § 552(a)(4)(B) that federal agencies bear the burden of proof in justifying FOIA exemptions.

## CONCLUSION

For the foregoing reasons, the FBI's Petition should be denied. In the alternative, the respondent's formulation of the question presented should be adopted.

Respectfully submitted,

SMITH, MULLIN & KIERNAN, P.C.
*Attorneys for Respondent*
*Vincent James Landano*

BY: NEIL MULLIN, Esq.

DATED: July 22, 1992

Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

No. 91-2054

# In the Supreme Court of the United States

OCTOBER TERM, 1992

---

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., PETITIONERS

*v.*

VINCENT JAMES LANDANO

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## REPLY BRIEF FOR PETITIONERS

---

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

# In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2054

UNITED STATES DEPARTMENT OF JUSTICE, ET AL., PETITIONERS

*v.*

VINCENT JAMES LANDANO

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR PETITIONERS

Respondent makes no attempt to rebut our submission that this case presents an important question under the Freedom of Information Act (FOIA) on which the federal courts of appeals are in conflict. Indeed, he readily acknowledges both the "split in authority among the circuit courts" and the "important" ramifications of the issue for the treatment of FBI records regarding confidential sources. Br. in Opp. 3-4.

1. As we show in the certiorari petition, the question presented—which concerns the showing the FBI and other federal law enforcement agencies must make in order to protect "confidential sources" under

FOIA Exemption 7(D)—is a recurring and important one. The court of appeals in this case ruled that the FBI had not adequately supported its invocation of Exemption 7(D), because it had not made a specific factual showing "of the particular circumstances of [each] interview or source." Pet. App. 28a. Nearly every other court of appeals to address the issue, by contrast, has recognized that the very nature of FBI witness interviews makes assurances of confidentiality "inherently implicit," and that Exemption 7(D) therefore protects information obtained in such interviews in the absence of evidence negating the confidential nature of a particular source. See Pet. 12 (collecting cases from six circuits).[1]

2. Respondent quibbles over the language in which the question presented should be cast, insisting that

[1] As we point out in the petition, only one other court of appeals appears to have imposed an evidentiary burden in Exemption 7(D) cases comparable to the one imposed by the Third Circuit here. See Pet. 8 n.5 & 19 n.11 (discussing *Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992)). This Court's denial of certiorari in *Wiener* by no means militates against certiorari here; on the contrary, it makes it all the more important to resolve in this case the issue of what showing the government must make to sustain its invocation of Exemption 7(D). The instant case, moreover, presents the issue in a significantly more clear-cut and manageable manner than did *Wiener*. Whereas the Exemption 7(D) issue arose in *Wiener* in the context of an interlocutory ruling that more detailed affidavits were required to support withholding, this case involves a final rejection of the FBI's invocation of that exemption and a final judgment requiring disclosure. And whereas *Wiener* was potentially complex and involved a number of FOIA exemptions, our petition here clearly presents the single issue of the application of Exemption 7(D)—an issue on which there is a well-defined and acknowledged conflict among the circuits.



the rule the other courts of appeals have adopted embodies an improper "presumption." Br. in Opp. 6-7. As we have already explained (Pet. 16 n.9), however, labels are not important; the issue is the same regardless of whether it is thought to call for an inquiry into the nature of the "prima facie case" the government must present to support withholding under Exemption 7(D), or into the appropriateness of relying on a "presumption" in this setting. In either event, the need for a clear and consistent rule regarding what the FBI must do in FOIA litigation in order to protect its vital confidential sources (and information they furnish) from public disclosure cannot be disputed.

3. The sole argument respondent makes against certiorari is a weak attempt to set this case apart factually from the general run of Exemption 7(D) cases, on the ground that the FBI's affidavits supposedly are "so deficient" that he would prevail even if our view of the controlling law were adopted. Br. in Opp. 4-6.[2] This argument is based on a misstate-

[2] Respondent also takes issue with our characterization of the FBI's role in the underlying murder investigation, repeating the vague assertions he made below regarding the FBI's supposed participation in a "federal/state/local team that investigated and prosecuted the criminal case against" him. Br. in Opp. 2-3. As respondent appears to recognize, however, such arguments have nothing to do with the issues under Exemption 7(D) that are presented in our petition; they are pertinent, if at all, only to the issues addressed in respondent's cross-petition for certiorari, which seeks review of the court of appeals' holding that the FBI properly invoked Exemption 7(C) (the law-enforcement/privacy exemption) to protect other information. See *Landano* v. *United States Department of Justice*, cross-petition for cert. pending, No. 92-161 (filed July 24, 1992). We address those distinct issues in our brief

ment of the opinion below, and on a view of law enforcement that blinks reality.

Contrary to respondent's assertions, the court of appeals did not "conclude[] that * * * the outcome of the case would be the same" under our approach to Exemption 7(D), on the ground that the FBI's affidavit did not recite that the confidential sources at issue knew they were being interviewed by FBI agents. See Br. in Opp. 4. Rather, the court of appeals simply speculated that the existing record "might" still be inadequate under our approach, because of the lack of either such evidence concerning each particular source *or* a more general recitation regarding "consistent FBI practice." Pet. App. 25a n.4. Such speculation on the court of appeals' part was misplaced. The interviewers' identification of themselves as FBI agents is such a well-known and routine part of FBI interviews that the sort of recitations envisioned by the court of appeals would be superfluous.[3] In any event, if some further factual showing on this point were necessary, the matter may properly be dealt with on remand, following resolution by this Court of the appropriate *legal* standards governing an agency's invocation of Exemption

---

in opposition to the cross-petition in No. 92-161, which we are filing simultaneously with this reply brief.

[3] See Federal Bureau of Investigation, *Manual of Investigative Operations and Guidelines, Manual No. 2815* (Jan. 31, 1978) (Section 7 (Interviews), item 7-1 (Use of Credentials for Identification): "Credentials (commissioner cards) shall be exhibited to all persons interviewed by Special Agents so there will be no doubt concerning the organization with which they are connected.").



7(D).[4] The potential existence of that factual issue in further proceedings therefore in no way detracts from the pressing need for definitive guidance from this Court to resolve the clear conflict in circuit authority on the threshold legal issue presented in the certiorari petition.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

AUGUST 1992

---

[4] That course is especially appropriate because the notion that the FBI should specifically address the issue of the interviewees' knowledge that the interviewers were in fact FBI agents was never suggested by respondent in either of the courts below.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 60022

Supreme Court, U.S.
FILED
NOV 19 1992
OFFICE OF THE CLERK

No. 91-2054

# In the Supreme Court of the United States

OCTOBER TERM, 1992

---

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

VINCENT JAMES LANDANO

---

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

---

## JOINT APPENDIX

---

NEAL MULLIN
*Smith, Mullin & Kiernan, P.C.*
*200 Executive Drive*
*Suite 155*
*West Orange, New Jersey 07052*
*(201) 736-0733*
*Counsel for respondent*

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*
*Counsel for petitioners*

**PETITION FOR A WRIT OF CERTIORARI FILED JUNE 22, 1992**
**CERTIORARI GRANTED OCTOBER 5, 1992**

TABLE OF CONTENTS *


| | Page |
|---|---|
| Relevant district court docket entries | 1 |
| Relevant court of appeals docket entries | 4 |
| Amended Complaint | 9 |
| Amended Answer | 14 |
| Declaration of Regina M. Superneau | 18 |
| Order dated December 13, 1990 | 43 |
| Order granting the petition for certiorari | 45 |


* The principal rulings of the district court and of the court of appeals are printed in the appendix to the petition for a writ of certiorari and have not been reproduced herein.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

No. 90-CV-1953

LANDANO

*v.*

DEPT. OF JUSTICE, ET AL.

---

**RELEVANT DOCKET ENTRIES**

| DATE | | PROCEEDINGS |
|---|---|---|
| 5/16/90 | 1 | COMPLAINT filed; FILING FEE $120.00 RECEIPT #130383 [Entry date 05/22/90] |
| | * * * * | |
| 5/16/90 | 3 | NOTICE of Allocation and Assignment filed. Magistrate RONALD J. HEDGES [Entry date 05/22/90] |
| | * * * * | |
| 6/14/90 | 5 | ANSWER to Complaint by DEPT. OF JUSTICE, FBI [Entry date 06/15/90] |
| 7/30/90 | 6 | CONSENT ORDER, for leave to file First Amended Complaint (signed by Judge H. L. Sarokin) [Entry date 08/01/90] |
| 8/9/90 | 7 | AMENDED ANSWER to Complaint by FBI, DEPT. OF JUSTICE: amends [5-1] answer (ej) [Entry date 08/14/90] |

| DATE | | PROCEEDINGS |
|---|---|---|
| 8/13/90 | 8 | AMENDED COMPLAINT by VINCENT JAMES LANDANO, (Answer due 8/23/90 for DEPT. OF JUSTICE, for FBI) amending [1-1] complaint [Entry date 08/15/90] |
| 9/10/90 | 9 | Notice of MOTION by VINCENT JAMES LANDANO for partial summary judgment, Motion hearing set for 10/9/90 on [9-1] motion w/evidence of service & BRIEF SUB. * * * [Entry date 09/11/90] |
| 9/10/90 | 10 | SEALED DOCUMENT (Certification of Francis A. Polito). [Entry date 09/11/90] |
| 9/21/90 | 11 | Notice of CROSS MOTION by FBI, DEPT. OF JUSTICE to dismiss, Motion hearing set for 10/9/90 on [11-1] cross motion w/Cert. of Svc. (BRIEF SUB). [Entry date 09/25/90] |
| 9/21/90 | 12 | DECLARATION of Regina M. Superneau Re: [11-1] cross motion to dismiss [Entry date 09/25/90] |
| 10/1/90 | 13 | Notice of CROSS MOTION by VINCENT LANDANO for summary judgment, Motion hearing set for 11/13/90 on [13-1] cross motion w/Certification of Service. (BRIEF SUB) [Entry date 10/03/90] |
| | | * * * * |
| 11/29/90 | 17 | OPINION (signed by Judge H. L. Sarokin) (ej) [Entry date 11/30/90] |
| 11/29/90 | 18 | ORDER granting in part, denying in part [11-1] cross motion to dismiss mooting [9-1] motion for partial summary judgment (signed by Judge H. L. Sarokin) [Entry date 11/30/90] |
| | | * * * * |



| DATE | | PROCEEDINGS |
|---|---|---|
| 12/10/90 | 21 | Notice of MOTION by FBI, DEPT. OF JUSTICE for reconsideration of [18-1] order, Motion hearing set for 1/14/91 on [21-1] motion w/Certificate of Service & BRIEF SUB. [Entry date 12/12/90] |
| | | * * * * |
| 12/13/90 | 23 | ORDER granting in part, denying in part [21-1] motion for reconsideration of [18-1] order granting in part, denying in part [13-1] cross motion for summary judgment, vacating [18-1] order (signed by Judge H. L. Sarokin) (ej) |
| 12/27/90 | 24 | Notice of MOTION by FBI, DEPT. OF JUSTICE for reconsideration of [23-1] order vacating [18-1] order, Motion hearing set for 1/14/91 on [24-1] motion w/Certificate of Service. (BRIEF SUB) |
| | | * * * * |
| 2/1/91 | 27 | TRANSCRIPT of Proceedings taken on 1/28/91 (SAROKIN) (ej) [Entry date 02/04/91] |
| 2/25/91 | 28 | OPINION (signed by Judge H. L. Sarokin) |
| 2/25/91 | 29 | ORDER, clarifying & amending [23-1] order vacating [18-1] order, [17-1] order (signed by Judge H. L. Sarokin) |
| 2/28/91 | 30 | AMENDED OPINION (signed by Judge H. L. Sarokin) [Entry date 03/01/91] |
| 2/28/91 | 31 | AMENDED ORDER clarifying & amending opinion of 11/29/90 & order of 12/13/90. (signed by Judge H. L. Sarokin) [Entry date 03/01/91] |
| 3/8/91 | 32 | NOTICE OF APPEAL filed by 1:00 by FBI, DEPT. OF JUSTICE Re: [31-1] order, [23-1] order vacating [18-1]order. * * * [Entry date 03/11/91] |

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5161

VINCENT JAMES LANDANO

*v.*

UNITED STATES DEPARTMENT OF JUSTICE;
THE FEDERAL BUREAU OF INVESTIGATION,
APPELLANTS

**RELEVANT DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 3/12/91 | CIVIL CASE DOCKETED. Notice filed by US Dept of Justice, FBI. |
| | * * * * |
| 3/12/91 | MOTION filed by Appellants to stay district court order dated February 28, 1991 (which compells the releasement of FBI files on March 25, 1991 at 4:00 p.m.) pending appeal. Certificate of Service dated 3/11/91. |
| | * * * * |
| 3/20/91 | ORDER filed (*Sloviter*, Chief Judge and Scirica, Circuit Judge) It is hereby ORDERED that the district court's order of February 28, compelling the release of FBI files is stayed pending further order of this court. Defendant United States is directed to respond by letter to be filed with the Clerk of this Court, no later than Tuesday, March 26 to the letter of March 19 from Neil Mullin, counsel for the appellee, stating reasons, if any, why the documents in its possession which pertain solely to Victor Forni should not be released forthwith, filed. (emd) |
| | * * * * |



| DATE | PROCEEDINGS |
|---|---|
| 4/2/91 | EXPEDITED SUPERSEDING BRIEFING NOTICE ISSUED. Appellant brief and appendix due to be hand-filed & hand-served 4/16/91; Appellee's brief due to be hand-filed & hand-served 4/29/91; Appellant's reply brief, if any, due to be hand-filed & hand-served 5/6/91. (adl) |
| 4/2/91 | ORDER filed (*Sloviter* ZZ!, Chief Judge, and Scirica, Circuit Judge) After consideration of the correspondence by counsel, the stay order entered March 20, 1991 will stand without change, leaving all remaining issues to be addressed by the parties to the merits panel to which this matter has been expedited. The Clerk is directed to expedite appeal, filed. |
| | * * * * |
| 4/15/91 | BRIEF on behalf of Appellant US Dept of Justice, Appellant FBI, Pages: 50, Copies: 10, Delivered by mail, filed. Certificate of service date 4/15/91. |
| 4/15/91 | APPENDIX on behalf of Appellant US Dept of Justice, Appellant FBI Copies: 4 Volumes: 1, Delivered by mail, filed. Certificate of service date 4/15/91. |
| 4/16/91 | CALENDARED for Tuesday, May 21, 1991. Rescheduled from 5/23/91. |
| 4/29/91 | BRIEF on behalf of Appellee Vincent James Landano, Pages: 50, Copies: 10, Delivered by mail, filed. Certificate of Service date 4/29/91. |
| 4/29/91 | MOTION filed by Appellee Vincent James Landano to file supplemental appendix including 4 pages of material (SA 59 to 62) supplementing the record below. |
| 4/29/91 | BRIEF IN SUPPORT on behalf of Appellee Vincent James Landano to motion to file supplemental appendix, filed. |

| DATE | PROCEEDINGS |
|---|---|
| 5/3/91 | REPLY BRIEF on behalf of Appellants US Dept of Justice and FBI, Copies: 10, Delivered by mail, filed. Certificate of service date 5/3/91. |
| 5/6/91 | Letter dated 5/3/91 from appellants advising they do not oppose motion to file supplemental appendix filed by Appellees on April 29, 1991 and they do not intend to file any response to that motion, received for the Court's information. |
| | * * * * |
| 5/20/91 | ARGUED 5/20/91 Panel: Stapelton, Scirica, Aldisert, Circuit Judges. |
| 5/21/91 | ORDER filed (*Stapleton*, Scirica, and Aldisert, Circuit Judges) granting motion to file supplemental appendix by Appellee Vincent James Landano. |
| 5/21/91 | SUPPLEMENTAL APPENDIX on behalf of Appellee Vincent James Landano. Copies. 10 Delivered by mail, filed. Certificate of service date 4/29/91. [see 5/21/91 order]. |
| | * * * * |
| 2/11/92 | OPINION (*Stapleton*, Authoring Judge, Scirica and Aldisert, Circuit Judges), filed. |
| 2/11/92 | JUDGMENT, Affirming insofar as that portion of the said judgment which directs production of material withheld solely on the basis of Exemption 7(D); and, reversed insofar as that portion of the judgment which orders production of material withheld in reliance on Exemption 7(C). It is further ordered and adjudged that on remand the said District Court is directed to enter a new judgment implementing the decision reached in the opinion of this Court. All of the above in accordance with the opinion of this Court, filed. |



| DATE | PROCEEDINGS |
|---|---|
| 2/19/92 | MOTION filed by Appellants US Dept of Justice and FBI to extend time to file petition for rehearing en banc to and including 3/26/92. Certificate of Service dated 2/18/92. |
| 2/24/92 | ORDER (Clerk) granting motion to extend time to file petition for rehearing en banc by Appellants US Dept of Justice and FBI. Extension granted to 3/26/92 |
| 2/24/92 | ORDER AMENDING OPINION *Stapleton*, Authoring Judge, Scirica and Aldisert, Circuit Judges, filed. |
| 3/26/92 | PETITION by Apellants for rehearing in banc, filed. Certificate of service dated 3/25/92. |
| 4/14/92 | ORDER filed (Sloviter, Chief Judge, Becker, *Stapleton*, Authoring Judge, Mansmann, Greenberg, Hutchinson, Scirica, Nygaard, Roth and Aldisert, Circuit Judges) denying petition for in banc rehearing by Appellant US Dept of Justice, FBI. Judges Becker, Stapleton, Mansmann, Greenberg and Hutchinson would have granted rehearing. |
| 4/17/92 | MOTION filed by Appel[illegible] US Dept of Justice and FBI to stay mandate to and including May 21, 1992. Certificate of Service dated 4/16/92. |
| 4/27/92 | RESPONSE filed by Appellee Vincent James Landano in opposition to motion to stay mandate. Certificate of service dated 4/24/92. |
| | * * * * |
| 5/11/92 | ORDER filed (Mansmann, Authoring Judge) granting motion to stay mandate by Appellants US Dept of Justice and FBI. Mandate Stayed to 5/21/92. |

| DATE | PROCEEDINGS |
|---|---|
| 5/14/92 | MOTION filed by Appellants US Dept of Justice and FBI to further stay mandate until 6/20/92. Certificate of Service dated 5/13/92. |
| 6/5/92 | ORDER filed (Stapleton, Authoring Judge) granting motion to further stay mandate by Appellants US Dept of Justice and FBI. Mandate Stay to 6/20/92 |
| 6/26/92 | Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellants US Dept of Justice and FBI. Filed in the Supreme Court on 6/22/92 at Supreme Ct. case number: 91-2054. |
| 7/30/92 | Supreme Court of U.S. notice filed advising petition for writ of certiorari filed by Appellee Vincent James Landano. Filed in the Supreme Court on 7/23/92 at Supreme Ct. case number: 92-161. |
| 10/9/92 | U.S. Supreme Court order dated 10/5/92 at S.C. number: 91-2054, granting petition for writ of certiorari by Appellant US Dept of Justice, FBI, filed. |
| 10/13/92 | U.S. Supreme Court order dated 10/5/92 at S.C. number: 92-161 ONLY, denying petition for writ of certiorari by Appellee Vincent James Landano. filed. |



UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

---

Civil Action No. 90-1953

VINCENT JAMES LANDANO, PLAINTIFF

*-vs-*

UNITED STATES DEPARTMENT OF JUSTICE AND THE FEDERAL BUREAU OF INVESTIGATION, DEFENDANTS

---

**FIRST AMENDED COMPLAINT FOR INJUNCTIVE RELIEF**

Vincent James Landano, residing at 51D Reading Road, Edison, New Jersey in the County of Middlesex, alleges:

1. This is an action brought under the Freedom of Information Act, 5 U.S.C. Section 552, as amended (hereinafter "FOIA") to enjoin defendants from withholding from public disclosures certain records of the United States Department of Justice, Federal Bureau of Investigation, within their possession and control.

2. This action is further brought under the Privacy Act of 1974, 5 U.S.C. Section 552a (hereinafter the "Privacy Act"), to enjoin defendants from preventing plaintiff's access to certain records within an agency system of records which pertain to the murder of Newark Police Officer John Snow on August 13, 1976, and to compel the delivery of such documents or copies thereof for inspection by the plaintiff.

3. This Court has jurisdiction over this action pursuant 5 U.S.C. 552(a)(4)(B) and Section 552a(g)(1)

(B), and venue is proper under 5 U.S.C. Section 552a (g)(5).

4. Plaintiff has exhausted all administrative remedies pursuant to Section 552(a)(5)(C).

5. Plaintiff, Vincent James Landano, is a citizen of the United States who was convicted of the murder of Newark Police Officer John Snow in Hudson County Superior Court in the State of New Jersey on May 17, 1977. The records to which plaintiff seeks access contain information concerning the investigation and prosecution of another suspect, Victor Forni who has, since plaintiff's conviction, been implicated as the actual murderer of Officer Snow. *See, Landano v. Rafferty, et al.*, 126 F.R.D. 627 (D.N.J. 1989)

6. Defendant, United States Department of Justice, is an agency of the United States, established by statute and charged with responsibility for, *inter alia*, the administration of justice.

7. Defendant, Federal Bureau of Investigation (hereinafter "FBI), an agency within the defendant United States Department of Justice, is an agency of the United States established by statute and charged with responsibility for *inter alia*, law enforcement.

8. Plaintiff has filed two separate FOIA Requests. On or about September 30, 1988, plaintiff requested access to FBI files pertaining to the murder of Police Officer John Snow. Defendants have designated this request as number 306,424 (hereinafter referred to as the "Snow Request" *Exhibit A*, hereto).

9. On or about January 10, 1989, plaintiff made an additional request for access to FBI files pertaining specifically to Victor Forni (a copy of that request is attached as *Exhibit B*). The defendants have designated that request as number 310,265 (hereinafter the "Forni Request").

10. After a delay of approximately 20 months, defendants partially and inadequately responded to the



Snow Request (#306,424) on May 11, 1990. Defendants provided plaintiff with only 330 of 733 document pages which defendants identified as responsive to plaintiff's request. Many of the 330 pages produced are heavily redacted.

11. On or about May 21, 1990, plaintiff appealed defendants denial of plaintiff's Snow Request (#306,424). (A copy of plaintiff's appeal letter is attached as *Exhibit C.*)

12. On or about July 3, 1990, defendants denied plaintiff's appeal by affirming their initial action with respect to the Snow Request (#306,424). (A copy of the letter denying plaintiff's appeal is attached as *Exhibit D.*)

13. Approximately 17 months have passed since plaintiff's Forni Request (#310,265) was made and defendants have failed to provide any access to such documents. On February 13, 1989 defendants forwarded a letter to plaintiff stating that the large number of FOIA requests had delayed its response to plaintiff's requests. (A copy of the letter is attached as *Exhibit E.*)

14. Plaintiff appealed defendants decision by letter of April 10, 1990. (A copy of the letter is attached as *Exhibit F.*)

15. By letter dated May 7, 1990 defendants denied plaintiff's appeal and conceded that plaintiff had exhausted administrative remedies. (A copy of the FBI letter denying Plaintiff's appeal is attached as *Exhibit G.*)

16. Plaintiff has exhausted all administrative remedies on both the Forni Request (#310,265) and the Snow Request (#306,424).

17. The defendants have failed to state any valid grounds for exemption under FOIA, the Privacy Act, or under agency regulation.

18. Plaintiff is presently out of prison under the supervision of federal authorities as the result of a ruling by United States District Judge H. Lee Sarokin on July 27 and 28, 1989. Judge Sarokin's ruling has been re-

versed by the Third Circuit and plaintiff now awaits the Supreme Court's decision on his Petition for Certiorari. There is a strong likelihood that if the decision of the Third Circuit is not reversed by the United States Supreme Court, plaintiff's claims will be the subject of an evidentiary hearing in the New Jersey Superior Court.

19. The FBI files contain critical evidence, including analysis of physical evidence and information concerning eyewitnesses to the Snow killing. This case involves a long term pattern of suppression of exculpatory evidence by various prosecutors. The FBI files will likely provide further evidence of such suppression and afford further grounds for post-conviction relief to the plaintiff.

20. The release of the FBI files will benefit the public interest by exposing the corrupt and illegal conduct of certain prosecutors and criminal investigators who have suppressed evidence concerning the Snow killing that reveals the identity of Snow's murderer. Many of these individuals presently serve as public servants and have never been reprimanded, penalized or punished in any way for their illegal activity. Several are still in a position which allows them to violate the law and the civil rights of United States citizens and others. These public servants have permitted a dangerous individual to move freely among the population and imprisoned plaintiff for a crime he did not commit. Conduct of this type compromises the safety of all individuals and tears at the fabric of the criminal justice system. The public has the right to obtain these files for the purpose of removing from office officials who have condoned such conduct and for the purpose of exposing such illegal activity.

21. Pursuant to FOIA, and the Privacy Act, plaintiff has a right of access to the documents requested and defendants have no legal basis for their actions in withholding such documents. The defendants have acted in arrogant disregard of the Freedom of Information Act, the Privacy Act, as well as their obligations under the Fifth Amendment of the United States Constitution to



make exculpatory, material evidence available to defendants.

WHEREFORE, plaintiff prays that this Court:

(a) order defendants immediately to make available all documents responsive to the Forni Request, No. 310,265, without redaction or deletions of any nature;

(b) upon exhaustion of administrative remedies, order defendants to make available all documents responsive to the Snow Request, No. 306,424, without redaction or deletions of any nature;

(c) award plaintiff costs and reasonable attorneys' fees in this action pursuant to 5 U.S.C. Section 552(a)(4)(E) and 5 U.S.C. Section 552a(g)(3)(B);

(d) issue a written finding pursuant to 5 U.S.C. Section 552(a)(4)(F), that the circumstances surrounding the withholding raise questions whether agency personnel acted arbitrarily or capriciously with respect to the withholdings; and,

(e) grant such other and further relief as the Court may deem just and proper.

SMITH, MULLIN & KIERNAN
100 Executive Drive, Suite 340
West Orange, New Jersey 07052
(201) 736-7033
Attorneys for Plaintiff-Appellee

By: s/ Neil Mullin
NEIL MULLIN, ESQ.

DATED: July 10, 1990

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

---

(Caption Omitted in Printing)

---

**AMENDED ANSWER**

[Filed Aug. 9, 1990]

Defendants, United States Department of Justice and the Federal Bureau of Investigation, by and through their attorneys, Michael Chertoff, United States Attorney, by Susan C. Cassell, Assistant U.S. Attorney, answering the allegations of plaintiff's Amended Complaint:

1. Paragraph 1 sets out one of plaintiff's legal bases for this action to which an answer its not required. To the extent an answer may be deemed required, defendants deny the allegations set forth therein.

2. Paragraph 2 sets out plaintiff's second legal basis for this action to which an answer is not required.

3. Paragraph 3 contains plaintiff's jurisdictional basis for this action to which an answer is not required. To the extent an answer may be deemed required, defendants deny the allegations set forth therein.

4. Paragraph 4 contains a legal conclusion to which an answer is not required. To the extent an answer may be deemed required, defendants deny the allegations set forth therein.

5. The defendants lack knowledge of information sufficient to form a belief as to the truth of the allegations set forth in paragraph 5 and, thus deny.

6. Defendants deny the allegations contained in paragraph 6, and assert that the Department of Justice is an



agency of the executive branch of ~~the~~ United States Government.

7. Defendants deny the allegations contained in paragraph 7, and assert that the Federal Bureau of Investigation is not an "agency" within the meaning of the term agency as defined in Title 5, U.S.C., Section 552(f).

8. Defendants deny the allegations contained in paragraph 8, and assert that plaintiff made a FOIA request dated September 30, 1988, directed to the Newark Office of the FBI, which received FOIPA # 306424.

9. Defendants deny the allegations contained in paragraph 9, and assert that the plaintiff made a FOIA request dated January 10, 1989, directed to FBI Headquarters, Washington, D.C., which received FOIPA #310265.

10. Defendants deny the allegations in paragraph 10.

11. Defendants admit the allegations contained in paragraph 11.

12. Defendants admit the allegations contained in paragraph 12.

13. Defendants admit that, with regard to FOIPA # 310265, the FBI sent a letter to plaintiff dated February 13, 1989, and otherwise deny, and assert that the FBI sent a letter to plaintiff dated September 27, 1989, wherein plaintiff was advised that without a proof of death or an authorized notarization of consent, the disclosure of law enforcement records or information about a private citizen other than the requesting party is an unwarranted invasion of personal privacy and defendants were prohibited by law from responding. Further, defendants assert that the FBI sent a letter to plaintiff's attorney dated May 10, 1990, enclosing a copy of the letter of September 27, 1989.

14. Defendants admit that the plaintiff appealed FOIPA #'s 306421 and 310265 to the Department of Justice by letter dated April 10, 1990, but otherwise deny the allegations set forth in paragraph 14.

15. Defendants deny the allegations in paragraph 15, and assert that the Department of Justice forwarded a

letter to plaintiff's counsel dated May 7, 1990, wherein plaintiff was advised that he may treat the May 7, 1990 letter as a denial of his appeal, and that he may bring action in an appropriate federal court. Plaintiff was also advised in the May 7, 1990 letter that the Department of Justice's role in any appeal was limited to review of those records to which access has been denied.

16. Defendants admit the allegations in paragraph 16.

17. Paragraph 17 contains a legal conclusion to which an answer is not required. To the extent an answer may be deemed required, defendants deny the allegations contained therein.

18. Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 18 and thus deny.

19. This paragraph contains characterizations of the underlying facts in this matter to which an answer is not required. To the extent an answer may be deemed required, defendants deny the allegations contained in paragraph 19.

20. This paragraph contains self-serving rhetoric, rather than allegations of fact; thus no response is necessary. To the extent defendants are required to respond, the defendants deny the allegations contained in paragraph 20.

21. Paragraph 21 contains conclusions of law to which no answers are required. To the extent an answer may be deemed required, defendants deny the allegations contained therein, and assert that plaintiff has failed to comply with a condition precedent under FOIA for release of information concerning a living person, other than the requesting party, in that plaintiff has failed to provide the defendants with a notarized consent of the party about whom information is sought.

The last section of plaintiff's complaint sets forth plaintiff's prayer for relief to which no answer is required.



To the extent an answer may be deemed required, defendants deny the allegations contained therein.

Any and all allegations in the plaintiff's complaint not heretofore specifically admitted, denied or averred are hereby denied.

## AFFIRMATIVE DEFENSE

1. This Court lacks subject matter jurisdiction over these claims, due to the plaintiff's failure to comply with a condition precedent to release of information under the FOIA.

2. The Complaint fails to state a claim against these defendants as to which relief may be granted regarding FOIPA # 310265, since it requested information regarding a living person, other than the requesting party, with out the consent of that person.

3. Any documents or portions of documents not produced by defendants are statutorily exempt from production under one of the FOIA exemptions.

4. The FBI is an improper defendant in any civil action under FOIA and the FBI should be dismissed as a party defendant. 5 U.S.C. § 552f.

WHEREFORE, the defendants, United States Department of Justice and the Federal Bureau of Investigation respectfully request that this Amended Complaint be dismissed in its entirety and that they be awarded costs and such other relief as this Court may seem just and proper.

Respectfully submitted,

MICHAEL CHERTOFF
United States Attorney

By: /s/ Susan C. Cassell
SUSAN C. CASSELL
Assistant U.S. Attorney
Deputy Chief, Civil Division

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

(Caption Omitted in Printing)

---

**DECLARATION OF REGINA M. SUPERNEAU**

I, Regina M. Superneau, hereby declare as follows:

(1) I am a Special Agent (SA) of the Federal Bureau of Investigation (FBI), and am currently assigned in a supervisory capacity to the Freedom of Information-Privacy Acts (FOIPA) Section, Information Management Division (IMD), at FBI Headquarters, (FBIHQ), Washington, D.C.

(2) Due to the nature of my official duties, I am familiar with the procedures followed by the FBI in responding to requests for information from its files received pursuant to the provisions of Title 5, United States Code (U.S.C.), Section 552, commonly known as the Freedom of Information Act (FOIA), and Title 5, U.S.C., Section 552a, commonly known as the Privacy Act (PA) of 1974. I am familiar both with the procedures followed in responding to the plaintiff's FOIA request and with the documents responsive to that request.

(3) The purpose of this declaration is to: (a) Set forth the pertinent correspondence related to plaintiff's FOIPA request; (b) Explain the FBI's Central Records System (CRS); (c) Identify records found in FBIHQ which are responsive to plaintiff's FOIPA request; (d) Explain the processing of plaintiff's FOIPA request; and (e) Justify the propriety of the FOIA exemptions claimed by the FBI.



I. CORRESPONDENCE PERTAINING TO PLAINTIFF'S FOIPA REQUEST

(4) The following communications pertain to plaintiff's FOIPA request. A true copy of each of the following nineteen (19) items of correspondence is attached hereto and made a part hereof as Exhibits A thru S.

(A) Letter from plaintiff to the FBI, Newark Field Office (NK), dated September 30, 1988, requesting all files pertaining to the murder of Newark Police Officer John Snow.

(B) Letter from NK to plaintiff, dated October 6, 1988, acknowledging receipt of plaintiff's request. Plaintiff was advised that a search of the indices as NK revealed one main file responsive to plaintiff's request and that his request was being referred to FBIHQ for appropriate handling.

(C) Letter from FBIHQ to plaintiff dated November 15, 1988, advising plaintiff that there were approximately 600 pages to process and that the estimated duplication fee would be $50.00.

(D) Letter from plaintiff to FBIHQ, undated, advising of his willingness to pay the duplication fees.

(E) Letter from FBIHQ to plaintiff, dated December 5, 1988, acknowledging receipt of his letter, in which he expressed his willingness to pay duplication fees. Plaintiff was also advised there would be a delay in handling his request due to the large number of FOIPA requests received by the FBI.

(F) Letter from plaintiff to FBIHQ, dated December 11, 1988, inquiring if advance payment would expedite the processing of his request.

(G) Letter from FBIHQ to plaintiff, dated January 30, 1989, advising plaintiff that advance payment would not assist in expediting his request. Also enclosed was a copy of the U.S. Department of Justice policy entitled "When to Expedite FOIA Requests."

(H) Letter from Mr. Neil Mullin, plaintiff's attorney, to FBIHQ, dated May 26, 1989. Mr. Mullin advised that his client would be appearing on June 2, 1989, before Judge Sarokin in the U.S. District Court, District of Newark and that he wanted the requested documents before that date.

(I) Letter from FBIHQ to plaintiff, dated October 12, 1989, advising plaintiff of substantial delays in handling the backlog of requests. Plaintiff was further advised that until his request had been partially or fully completed, he would not receive any further correspondence from the FBI.

(J) Letter from FBIHQ to Mr. Mullin, dated November 6, 1989, enclosing a copy of a letter sent to his client regarding the status of his request. Mr. Mullin was advised that the letter was returned to the FBI with no forwarding address and he was asked to advise the FBI if his client was still interested in obtaining the documents.

(K) Letter from Mr. Mullin to FBIHQ, dated November 15, 1989, advising that his client was still interested in pursuing his request. He also requested that FBIHQ forward all future correspondence regarding his client's request to his office.

(L) Letter from plaintiff to FBIHQ, dated November 15, 1989, advising that he was still interested in his FOIA request and that all future correspondence should be directed to his current address.

(M) Letter from Mr. Mullin to the Department of Justice, Office of Information and Privacy (DOJ/OIP), dated April 10, 1990, wherein he gave notice of an administrative appeal.

(N) Letter from FBIHQ to plaintiff, dated April 18, 1990, advising plaintiff that there were 330 pages ready for release and that the amount due for duplication was $23.00.

(O) Letter from Mr. Mullin to FBIHQ, dated April 23, 1990, enclosing check for $23.00.



(P) Letter from plaintiff to FBIHQ, dated May 2, 1990, furnishing authorization to release all FOIA material to Mr. Mullin.

(Q) Letter from FBIHQ to plaintiff, dated May 8, 1990, releasing 330 pages pursuant to plaintiff's request.

(R) Letter from DOJ/OIP to Mr. Mullin, dated June 5, 1990, in which DOJ acknowledged receipt of plaintiff's administrative appeal and advised him that the substantial backlog which existed might cause some delay.

(S) Letter from DOJ/OIP to Mr. Mullin, dated July 3, 1990, in which he was advised that the FBI's action in the matter had been affirmed.

## II. EXPLANATION OF THE FBI'S CENTRAL RECORDS SYSTEM

(5) The CRS of the FBI consists of administrative, applicant, criminal, personnel and other investigative files compiled for law enforcement purposes. This system maintains the files in a numerical sequence, delineated according to subject matter. The subject matter of a file may relate to an individual, organization, company, event, activity or foreign intelligence matter. Access to the CRS is afforded by the General Indices, which is arranged in alphabetical order and consists of over 68 million index entries concerning various subject matters.

(6) The index entries fall into two general categories: "main" index entries and "cross-reference" index entries. A main index entry carries the name of an individual, organization, activity, or the like, which is the principal subject of a file contained in the system. A cross-reference index bears the name of an individual, organization, activity, or the like, which is not the subject of the file, but rather is located in a file concerning the investigation of another individual or organization. It should be noted that the FBI does not index all the names of individuals contacted or information received during an

investigation. Only those names and that information considered pertinent, relevant and necessary for further retrieval are indexed. The decision to index is made by the investigative FBI Agent or supervisor in the field and the supervising FBI Agent at FBIHQ, except for the names of subject(s), suspect(s), or victim(s) carried in the case caption, which are automatically indexed.

## III. MECHANICS OF HANDLING FOIPA REQUESTS

(7) In order to equitably administer the processing of requests for records in accordance with the disclosure provisions of the FOIA and PA, all such requests are handled in the approximate order received by the FOIPA Section.

(8) Upon receipt of a request, a search is made of the General Indices of the CRS. If no record of an investigation concerning the subject matter of the request is located, the requester is so advised. If the CRS search indicates that files which may be within the purview of the request have been located, the requester is so advised. The request is then placed in the backlog in chronological order based upon the date of receipt. Once the FBI is able to initiate actual processing, the request is assigned to a Miscellaneous Documents Examiner (MDE) for processing.

(9) The mechanical task of processing an FOIPA request involves first retrieving the original file from the CRS. The file is then examined to determine if there is a need for a security classification review. Should the MDE determine that such a review is required, the records are forwarded to the Document Classification Appeals and Affidavits Unit (DCAAU), where the records are once again handled in chronological order by the date of receipt. After the classification review by the DCAAU, based on a line-by-line reading of the documents, the records are returned to the assigned MDE for continued processing according to the original date of receipt.



(10) The MDE then has the file photocopied. This work copy is then reviewed and marked for deletions and exemptions, as authorized by statute and where appropriate. From the working copy, an additional copy is made for the requester showing the deleted portions blacked out. Similar to the classification review, this review consists of a line-by-line reading, with constant attention to matters which involve, among other considerations, the privacy and confidentiality of third parties, classified data, and other information that is exempt from release pursuant to the FOIA and PA statutes.

(11) This entire review process is carried out under the supervision of Special Agent Attorneys. This is done to ensure that no material to which the requester is entitled is erroneously withheld and that no material that should be withheld is inadvertently released. The time necessary to process a request cannot be significantly reduced without taking shortcuts that could threaten the legitimate interest of both the requester and the Government, as well as the rights of third parties appearing in the files under consideration.

## IV. IDENTIFICATION OF RECORDS WITHIN THE SCOPE OF THE PLAINTIFF'S REQUEST

(12) Pursuant to the plaintiff's request of September 30, 1988, to NK for information regarding the murder of Police Officer John Snow, a search of the General Indices was conducted. This search revealed one "main" file, NK 184-68, which was deemed to be responsive to plaintiff's request. A corresponding "main" file, FBIHQ 184-533, was located. The "184" classification concerns FBI investigations into "Police Killings." The legal authority under which the FBI conducts its investigation into police killings is pursuant to a Presidential Directive, dated June 3, 1971.

(13) NK file 184-68 consists of two volumes and two Sub A sections, which contain 726 pages. This file per-

tains to a police killing investigation, of which plaintiff was a subject and which resulted in his conviction. The file was processed and 324 pages were released after excisions were made pursuant to exemptions authorized under subsection (j)(2) of Title 5, U.S.C. Section 552a and subsections (b)(2), (b)(6), (b)(7)(C), (b)(7)(D) of Title 5, U.S.C., Section 552.

(14) FBIHQ "main" file 184-533 is a one-volume file which contains 233 pages. Numerous documents in the Newark file that were processed pursuant to plaintiff's request were found to be duplicative of those contained in the file at FBIHQ. These duplicate documents were not considered for release unless additional information was included on the duplicate documents. Six pages from the FBHIQ file were released after excisions were made pursuant to exemption (b)(7)(C) of Title 5, U.S.C., Section 552.

## V. DESCRIPTION OF DOCUMENTS

(15) The following is a description of the types of documents released to plaintiff:

(A) *Airtel.* An airtel is transmitted by mail and is an interim summary of information, usually of the activities of one of the field divisions of the FBI. It is designed to expeditiously alert other field divisions and/or FBIHQ of a pertinent development in a case that would require prompt attention.

(B) *Memorandum.* This document is a summary of activities of all pertinent field divisions of the FBI, and is prepared by an FBIHQ official for another FBIHQ official, to assist in the overall supervision of the case. This type of document is also prepared by a case agent in a field division, and is directed to his or her immediate supervisor or to the Special Agent in Charge of the field division, to advise of pertinent developments in the investigation. Its format is similar to a letter,



but the purpose is different, inasmuch as it is designed strictly for internal use.

(C) *Investigative Report.* This document is a summary of investigative activities prepared by various field offices of the FBI and is submitted to FBIHQ. It addresses itself to the focus of the investigation which is indicated in the title of the case.

(D) *Teletype.* This document is transmitted by teletype and, like an airtel, is an interim summary of information, usually of the activities of one of the field divisions of the FBI. It is designed to expeditiously alert other field divisions and/or FBIHQ of a pertinent development in a case.

(E) *FD-159.* This document is used to record information of an investigation that was furnished to other agencies.

(F) *FD-160.* This document is an indices search slip. This form is used by field divisions to search their general indices and list "main" files and "cross-references" identifiable with a subject.

(G) *FD-340 and FD-340a.* These documents are envelopes contained in the files of the field division that conducted the investigation. Enclosed in the envelopes are exhibits such as photographs, interview notes, statements from subjects, complaints, and subpoenas obtained by the FBI during the investigation.

## VI. JUSTIFICATION OF DELETED MATERIAL

(16) The records at issue in this case are part of the CRS of the FBI. Accordingly, all these records are properly exempt from disclosure under the PA pursuant to Title 5, U.S.C., Section 552a, (j)(2), and the regulation under which the FBI applies exemptions is found at Title 28, Code of Federal Regulations (CFR), Section 16.96. The pertinent records were, nevertheless, processed under the FOIA to determine which, if any, could be released.

## VII. EXPLANATION OF FORMAT UTILIZED FOR THE JUSTIFICATION OF DELETED MATERIAL

(17) The format utilized in this case to itemize, index and justify the deleted material details the specific exemption asserted for a particular deletion and a precise description and justification for the deleted material.

(18) Prior to the preparation of this declaration, the responsive documents were completely reviewed, and it was determined that the deleted information fell into four main categories. Each of the categories enumerated hereinafter contain a recitation of the statutory exemption asserted, the rationale for its application, and a precise description of the subject matter of the particular deletion. Emphasis has been placed on adequately describing the content of the withheld information to avoid a general conclusory assertion that the material is exempt.

(19) Attached hereto as Exhibit T are Documents 1 through 200, which are copies of responsive documents released to plaintiff. These documents contain, on their faces, coded categories of exemptions, which detail the nature of the information withheld pursuant to the provisions of the PA, Title 5, U.S.C., Section 552a and Title 5, U.S.C., Section 552. To further describe with any more specificity the information being withheld would identify the material sought to be protected. Every effort was made to provide the plaintiff with all reasonably segregable portions of the material requested.

(20) Copies of the documents released to the plaintiff are assembled in the same sequence as they appear in the original files maintained by the FBI. Whenever the FBI has withheld pages in their entirety, a sheet has been substituted listing the number of pages denied, their location within the file, and the exemptions pursuant to which they were withheld.

(21) The following is a discussion of the mechanics of the coded format provided to the Court.



## VIII. MECHANICS OF UTILIZING FORMAT

(22) To determine the pertinent justification for deleted material on each processed document, refer to the document in question, note the coded number adjacent to the deleted material and then refer to the corresponding coded category listed below.

(23) For example, if (b)(7)(C)-1 appears on the document, the (b)(7)(C) designation refers to the general discussion in the main category of the exemption asserted relative to an "Unwarranted Invasion of Privacy." The subcategory "1" particularizes and describes the specific material deleted, which, in this example, is the identity of FBI personnel.

## IX. JUSTIFICATION CATEGORIES: EXEMPTIONS ASSERTED; RATIONALE; DESCRIPTION OF DELETED MATERIAL

(24) This section contains a discussion of the substantive categories and subcategories of deleted information.

Summary of Justification Categories

| | |
|---|---|
| Category (b) (2) | Internal Agency Rules and Practices |
| (b) (2)-1 | Informant Symbol Numbers (Cited in conjunction with (b) (7) (D)-1) |
| Category (b) (6) | Clearly Unwarranted Invasion of Personal Privacy |
| (b) (6)-1 | Rap Sheets of Third Parties |
| Category (b) (7) (C) | Unwarranted Invasion of Personal Privacy |
| (b) (7) (C)-1 | Names and/or Initials of Special Agents and/or Clerical Personnel of the FBI |
| (b) (7) (C)-2 | Identities and/or Information Pertaining to Third Parties Who Are Mentioned in FBI Files |

| | |
|---|---|
| (b) (7) (C)-3 | Information Concerning the FBI's Investigative Interest in a Third Party |
| (b) (7) (C)-4 | Identities of Sworn State and Local Law Enforcement Officers (Cited in conjunction with (b) (7) (D)-4) |
| (b) (7) (C)-5 | Witnesses and Similar Third Parties Interviewed in the Course of an FBI Investigation (Cited in conjunction with (b) (7) (D)-3) |
| Category (b) (7) (D) | Confidential Source Material |
| (b) (7) (D)-1 | Source Symbol Numbers |
| (b) (7) (D)-2 | Identities and/or Information Furnished by an FBI Source Reporting on a Regular Basis |
| (b) (7) (D)-3 | Names of Third Parties and/or Information Provided by Them Under an Implied or Express Promise of Confidentiality (Cited in conjunction with (b) (7) (C)-5) |
| (b) (7) (D)-4 | Identities and/or Information Provided by Non-Federal Law Enforcement Agencies (Cited in conjunction with (b) (7) (C)-4) |
| (b) (7) (D)-5 | Identities and/or Information From Financial and/or Commercial Institutions and Local Non-Law Enforcement Agencies Furnished in Confidence |

(25) Information denied to plaintiff was withheld pursuant to Title 5, U.S.C., Section 552, exemptions (b)(2), (b)(6), (b)(7)(C), (b)(7)(D). Following is a detailed explanation of the application of these exemptions to the withheld documents.



(b)(2)-1 *Internal Agency Rules and Practices*

(26) Title 5, U.S.C., Section 552, subsection (b)(2), sets forth an exemption for information relating solely to the internal rules and practices of an agency. This exemption pertains to agency instructions for agency personnel regarding agency business that is of no interest to the general public.

(27) Exemption (b)(2)-1 was utilized to delete source symbol numbers. Symbol numbers are used exclusively as internal identifiers for administrative control and have no bearing on the substance of the information. This purely internal FBI practice of numerically cataloging sources allows the FBI to more efficiently direct investigative documents to the proper files and attribute information to sources without specifically identifying that source. In each instance, the (b)(7)(D) exemption was asserted in conjunction with (b)(2) to delete informant symbol numbers.

(b)(6)-1 *Personal Privacy Exemption*

(28) Title 5, U.S.C., Section 552, subsection (b)(6) exempts from disclosure personnel files, medical files and similar files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. This exemption requires the balancing of an individual's rights to privacy which includes background investigations, medical information and similar privacy values "against the preservation of the FOIPA's basic purpose of disclosure."

(29) In this case, the information withheld under the provisions of exemption (b)(6) consisted of criminal history records of third parties. The disclosure of such records would constitute a "clearly unwarranted invasion of personal privacy". In making a determination regarding disclosures of this material, the public's right to know was balanced against the individual's right to privacy. It was concluded that the ramifications of release, that is, the

potential harassment, criticism, and embarrassment of the third parties, would far outweigh the minimal public interest in the criminal history records of the third parties and would thus be a clearly unwarranted invasion of their personal privacy.

(b)(7)(C) *Unwarranted Invasion of Personal Privacy*

(30) Title 5, U.S.C., Section 552, subsection (b)(7)(C) exempts from release "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information could reasonably be expected to constitute an unwarranted invasion of personal privacy." In making a determination whether to release the identities of third parties and the information about them contained in the records responsive to the plaintiff's FOIPA request, the public's interest has been carefully balanced against the individual's right to personal privacy.

(b)(7)(C)-1 *Names and Initials of FBI Employees*

(31) The identities of FBI personnel which appear in the documents at issue were protected since publicity, adverse or otherwise, regarding any particular investigation may seriously prejudice their effectiveness in the conduct of other investigations to which they are assigned. The privacy consideration protects FBI personnel, as private citizens, from unnecessary, unofficial questioning as to the conduct of an investigation, and from subpoenas issued by private litigants in civil suits related to official investigations. FBI personnel investigate violations of various criminal and national security statutes, and do not act in the capacity of private investigators for private litigants. They conduct searches, make arrests and perform other official administrative duties, all of which constitute reasonable, but nonetheless serious intrusions into individuals' lives. Many of these people carry grudges



resulting from their legal difficulties which last for years and sometimes need little excuse to harass the responsible FBI employee; therefore, in order to reasonably safeguard against an invasion of their privacy, the names and initials of FBI employees have been withheld.

(b)(7)(C)-2 *Identities of and Information Concerning Third Parties Mentioned*

(32) Exemption (b)(7)(C) was used to delete the names and identifying data concerning individuals who were mentioned during the course of interviews or contacts with other third parties, and towards whom no investigative effort was directed.

(b)(7)(C)-3 *Information Concerning Individuals Who Are of Investigative Interest to the FBI*

(33) It is not unusual for the FBI to pursue more than one individual in the same investigation. When third parties exist as co-subjects in an investigative file, one cannot always assume that one subject is aware of another's activities or the FBI's specific interest in another individual. Frequently, a considerable amount of background and other information is compiled regarding such associates and is contained in the same investigative file.

(34) The FBI has a responsibility to protect the privacy rights of individuals pursuant to the Privacy Act of 1974. The FBI cannot disseminate information gathered during the course of an investigation to persons not legally entitled to receive such information. To release to the plaintiff certain information about third parties appearing in FBI files would reveal the extent to which those persons were of investigative interest to the FBI. This would be an unwarranted invasion of personal privacy, because it might subject these individuals to unnecessary public attention, harassment, or criticism as well as possibly pose a threat to their safety. Since the FBI has no means of controlling the use made of information

released pursuant to an FOIA request, once such rights are breached by disclosure, they are lost forever.

(35) In making a determination in the instant case whether to release the identifying data of third parties and information about them to the plaintiff, an attempt was made to balance the public's right to know against the individual's right to personal privacy.

### (b)(7)(C)-4 *Identities of Non-Federal Law Enforcement Personnel*

(36) The identities of cooperating, non-Federal law enforcement personnel were withheld for reasons of personal privacy. There persons are identified in FBI records in their official capacities as individuals who provided information in connection with this investigation. To identify them might subject them, as individuals, to unofficial inquiries not anticipated by their contact with Federal agencies, thus resulting in an unwarranted invasion of their personal privacy.

### (b)(7)(C)-5 *Witnesses and Third Parties Interviewed*

(37) The (b)(7)(C)-5 exemption was asserted to delete the identities of third parties interviewed and personal information about them.

(38) The person interviewed will often supply the interviewing Special Agent with personal information about himself or herself. This personal information, unrelated to plaintiff's request, has been withheld as being an unwarranted invasion of personal privacy.

(39) In the above instances, exemption (b)(7)(C) has been used in conjunction with (b)(7)(D) to withhold the identities and all other personal information about third parties interviewed. All reasonably segregable information furnished by third parties has been released to plaintiff to the extent that it would not tend to identify those third parties.



(40) The main function of the FBI is information gathering and fact-finding. Through this the FBI assists in the enforcement of Federal statutes and carries out its responsibility in the national security field. By far the greatest part of the FBI's investigative effort is expended on interviewing witnesses, potential witnesses, and other individuals who provide background data or information of lead value. Information provided by these third parties is one of the FBI's most productive tools.

(41) During the course of an interview, the largest roadblock to successfully obtaining the desired information is the fear of subsequent exposure. The threat inherent in exposure is reprisal, which may be either physical or economic, or ridicule and ostracism. The possibility of litigation would also present a strong deterrent. In order to surmount these obstacles, persons being interviewed must be assured, either expressly or implicitly, that information received will be held in the strictest confidence. The continued access to persons willing to honestly relate pertinent facts bearing upon a particular investigation far outweighs any benefit plaintiff might derive from being furnished the names of those who cooperated with the FBI. If the identities of these interviewees were released and the fact that they spoke candidly with the FBI became known, their future cooperation, as well as the cooperation of others, would undoubtedly be inhibited.

### (b)(7)(D) *Confidential Sources*

(42) Title 5, U.S.C., Section 552, subsection (b)(7)(D) exempts from disclosure material that "could reasonably be expected to disclose the identity of a confidential source, . . . and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source."

During the course of most investigations, many individuals who are not established sources of the FBI, are interviewed under circumstances in which confidentiality is created. These individuals furnish information with either an expressed or implied understanding that their cooperation will not be needlessly divulged outside the FBI. Release of the identities of these confidential sources or the information they provided could subject these sources to negative public attention, and could inhibit future cooperation from these individuals or other individuals in possession of information of value to the FBI.

(b)(7)(D)-1 *Source Symbol Numbers*

(43) One method utilized to protect the identities of these confidential sources, who gave information under an expresed assurance of confidentiality, involves the use of source symbol numbers. This is reserved for confidential sources, whether individuals or organizations, who provide sensitive information to the FBI on a regular basis. These confidential sources are generally in a position to provide valuable information to the FBI in more than one case and are generally contacted by the FBI on a regular or periodic basis. When an FBI Special Agent initially contacts a source of this type, he or she gives the source an express promise of confidentiality. The source is assured that his or her relationship with the FBI will not be revealed to the public and that the information received will not be attributed to the source when used or disseminated by the FBI. It is this assurance upon which the source relies when he or she provides information. Without such assurance, it would be extremely difficult, if not impossible, for the FBI to develop and maintain confidential sources. In order to provide increased security, the FBI assigns permanent symbol numbers to such confidential sources. The symbol numbers, consisting of a combination of letters and numbers are unique to each source. They are used in written documents and communications to refer to the source in lieu of the source's name or identity.



(44) It is the FBI's position that even the release to the public of a confidential source's permanent symbol number could serve to reveal the source's identity. Several factors are relevant in support of this position. First, the letters and digits which comprise a confidential source's permanent symbol number have independent significance and meaning. Thus, disclosure of the permanent symbol number alone would serve to reveal certain important information about the source which might lead to the discovery of his or her identity. Secondly, the disclosure of a permanent symbol number should not be viewed as an isolated instance. If the source's permanent symbol number is released in one instance, it may also then be released in others. If the same permanent symbol number of a source is thus released to the public at various times and in various document contexts, this may ultimately lead to the identification of the confidential source. This is true because each new context in which the source's symbol number is disclosed reveals additional items of information such as dates, times, places and names of persons. This information can be added together and analyzed by an individual who is familiar with the facts and circumstances set forth in the documents, which could lead to the identification of the confidential source. This is a particularly critical consideration in regard to commercial sources since they are generally contacted by the FBI more often and over a longer period of time than most types of confidential sources.

(b)(7)(D)-2 *Identity and/or Information Furnished by an FBI Source Reporting on a Regular Basis*

(45) Exemption (b)(7)(D)-2 was used to delete information from sources quoted in the pertinent documents from whom information was regularly received under an

expressed assurance of confidentiality. This information was received with the understanding that it would be held in the strictest confidence. These sources are informants within the common meaning of that term and not merely conscientious or cooperative citizens. Illustrative of an expressed assurance of confidentiality is the manner in which the FBI treats such information. The identity of these sources is so sensitive that they are usually not referred to by name in the FBI document that records the information they furnished. The identities of these individuals are known to very few FBI employees and are available on a "need to know" basis only. These special precautions are needed because of the sensitive nature of the information being received and the possible harm that may befall these persons if their identities are revealed. The manner in which the FBI actually obtains information from these sources is also demonstrative of the expressed assurance of confidentiality under which it was received. The information is received only at locations and under conditions which assure the contact will not be noticed. It is only with the understanding of complete confidentiality that the aid of such people can be enlisted and only through this confidence that such individuals can be persuaded to continue providing valuable assistance in the future. Significantly, protection by exemption from disclosure is afforded by the statute to *all* the information furnished by the source, as well as the actual identity of the source. This exemption recognizes the reality that the identity of a source may be determined from an analysis of the information furnished by the source. Accordingly, the FBI deleted any information provided by confidential sources as described in this paragraph.

(46) It may also be noted that any disclosure which might reveal the confidential source's identity not only can cause great harm to the relationship between the FBI and the source, but also can cause considerable harm to the relationship between the FBI and other investigative agencies. The disclosure of a source's identity would forever neutralize that source as a future source of information. In addition, when the identity of one source is disclosed, it has a chilling effect on the activities and cooperation of other sources.



(b)(7)(D)-3 *Named Third Parties and/or Information Provided by Them Under an Implied Promise of Confidentiality*

(47) The FBI must consider the dangers to a cooperating individual of being revealed during an official investigation. Rumors and innuendos could have a lasting effect on the reputation and day to day life of the exposed individual if he or she is subjected to public scrutiny. Threats of violence and physical harm directed towards the individuals and members of his or her family may result in possible reprisals. In order that the FBI's investigative responsibilities are not deterred, persons being interviewed must be assured, either expressly or implicitly, that the information received will be held in the strictest of confidence. Consequently, subsection (b)(7)(D)-3 is asserted in conjunction with (b)(7)(C)-5, *supra*, to withhold the identities of persons interviewed and information received only from said parties.

(48) The privacy of a person interviewed has been consistently protected by the FBI on the basis that the information was received under an implied assurance of confidentiality. Under the FOIA, these considerations are stated in two separate exemptions, (b)(7)(C) and (b)(7)(D); however, they are not mutually exclusive.

(49) When Agents of the FBI conduct interviews, the FBI is seeking the assistance of the interviewee either to obtain facts that will result in the prosecution of the subject(s) of an investigation or to solicit the cooperation and assistance of the interviewee in a matter which may impact on the national security of the United States. In both cases, the FBI is asking individuals to become in-

volved in situations in which others may lose substantial liberty or property interests; thus, the interviewee is placed in a position that could subject him or her to acts of reprisal, harassment, litigation, or an unnecessary amount of public attention. Individuals providing information to Federal agencies in furtherance of a law enforcement activity must be free to do so without fear of possible reprisal should their identities or their information be disclosed to persons in whom they have not confided. This is not to say that any such reprisal is threatened or even likely in this case, but a general public policy requires that individuals must be free to furnish investigative information to the Government with complete candor and without the understandable tendency to hedge or withhold information out of fear that their names or information furnished will later be made public. Persons providing information, including witnesses to a crime who may expect to be called upon at a later time to testify in public at a judicial proceeding, should be secure in the knowledge that, absent the necessity of such public testimony with its attendant judicial restraints and protections, their assistance and their identities will be held in confidence. The fear of such exposure all too often inhibits the cooperation of otherwise conscientious citizens. These considerations have been met by the traditional willingness and ability of the FBI to assure persons interviewed that their identities would be protected.

(50) The considerations described in the preceding paragraph are recognized under the FOIA, which exempts from disclosure material furnished by confidential sources, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or in a lawful national security investigation. Significantly, protection from disclosure is afforded by the FOIA statute to all information furnished by these sources, as well as the actual identity of a source. This recognizes that the identity of a source



may be determined from an analysis of the information furnished by the source. This is particularly true when the analysis would be made by a person knowledgeable of the facts and circumstances which pertain to the investigation. What may seem trivial to the uninformed, may be of great importance to one who has a broad view of the scene and can put the questioned information in its proper context. The identification of a confidential source through such an analysis would be more than an unwarranted invasion of his or her personal privacy, it would breach the confidentiality under which he or she was interviewed.

(51) The FBI is aware that the Government generally provides the defendant in a criminal trial with the witnesses' prior statements and other documents. It is the FBI's position when processing these statements that disclosure of documents for the limited purpose of preparing one's defense in a criminal trial has no bearing on the processing of these very same documents under the FOIPA. The FBI believes that the disclosure by the Government for this limited purpose in accordance with a criminal defendant's Constitutional right to a full and fair trial should not be held as a waiver of the FBI's right to withhold the information pursuant to applicable FOIPA exemptions.

(52) Although it may be apparent from a reading of FBI documents that an individual may have been subjected to a criminal trial, FBI documents reporting on a trial are usually silent as to both who may have testified and the scope of their testimony. Generally, all that is reported is the fact of the trial, the verdict(s), and sentencing. During the course of most FBI investigations, it is not unusual for certain people to be interviewed and provide useful information but, for one reason or another, not testify at trial. The decision as to who will testify rests with the attorney prosecuting the case; therefore, a Document Examiner or reviewing Special Agent cannot engage in conjecture regarding the

identity of witnesses and the extent of their testimony. Accordingly, to protect the privacy of and the confidential relationships established with individuals appearing in FBI documents, the FBI routinely protects the identities of and the information received from those individuals through the application of appropriate FOIA exemptions, unless those documents reflect the appearance and testimony of an individual at a public trial.

(b)(7)(D)-4 *Identities of and Information Provided by Local Law Enforcement Agencies*

(53) The confidential source material being protected includes the identities of state law enforcement agencies, their personnel and information supplied from their records.

(54) The unauthorized disclosure of information which has been provided by local law enforcement agencies will have an adverse effect on the current system of exchange of information which exists in the law enforcement community. The FBI is convinced that the willingness of other law enforcement agencies to freely exchange essential information will be seriously jeopardized unless the current system of mutual confidentiality remains unchanged. This traditional understanding of confidentiality is reinforced on a daily basis through contacts Special Agents of the FBI have with the law enforcement community. The free flow of information between cooperating law enforcement agencies plays an integral part in the success of many criminal investigations. If the identities of the agencies and the information furnished by them were made public, without regard to the impact on those agencies, and in violation of the mutual confidential relationship, the FBI's future ability to carry out its investigative responsibilities would be seriously and, perhaps, irrevocably impaired.



(b)(7)(D)-5 *Identities and or Information From Financial and or Commercial Institutions and Local Non-Law Enforcement Agencies*

(55) The confidential source material deleted pursuant to (b)(7)(D)-5 was that emanating from private service corporations, such as communication companies, financial corporations and local and state government agencies which collect and regulate non-investigative information and which was furnished by an employee or employees of those institutions and agencies pursuant to either an implied or expressed assurance of confidentiality. These sources furnished to the FBI information readily available to them in the ordinary course of business, with the understanding that it would be held in the strictest confidence. As previously mentioned the most important tool an investigative agency possesses is the ability to elicit cooperation through interviews. This cooperation is attributed to their belief in the integrity of the FBI and the assurance that their cooperation will not be publicly exposed and thereby subject the employee or the organization to possible legal action or loss of business. To reveal the identities of these sources would breach the relationship and impede the future investigative efforts of the FBI by diminishing the willingness of these sources to cooperate.

(56) The information contained in this declaration constitutes a complete and accurate itemization of the documents responsive to the plaintiff's FOIA request. For each document or portion of a document withheld, justifications have been cited pursuant to exemptions contained in the FOIA. All reasonably segregable non-exempt responsive material has been provided to the plaintiff.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 21, 1990.

s Regina M. Superneau
REGINA M. SUPERNEAU
Special Agent
Federal Bureau of Investigation
Washington, D.C.



UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

---

(Caption Omitted in Printing)

---

**ORDER**

[Filed Dec. 13, 1990]

This matter having been opened to the court on plaintiff's motion for partial summary judgment with respect to the Forni file, pursuant to Fed. R. Civ. P. 56; and defendant's cross-motion for summary judgment with respect to the Forni and Snow files, pursuant to Fed. R. Civ. P. 56; and plaintiff having then cross-moved for summary judgment with respect to the Snow file; and the defendants having supplied a *Vaughn* index with respect to the Snow file; and defendants having received the consent of Mr. Forni to release the Forni file to plaintiff; and for the reasons stated in the court's November 29, 1990 opinion; and for good cause shown,

IT IS on this — day of December, 1990 hereby

ORDERED that plaintiff's motion for partial summary with respect to the Forni request is partially granted, requiring defendant to release all information in the Forni file which is not withholdable under the court's November 29, 1990 opinion; and it is further

ORDERED that defendant's cross-motion for summary judgment with respect to the Forni file is denied; and it is further

ORDERED that defendant's cross-motions for summary judgment with respect to the Snow file is granted as to all FBI symbol source and file numbers, symbol numbers of confidential FBI informants, individual rap

sheet information mentioned in defendant's Snow file, names of FBI informants or FBI undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information; and it is further

ORDERED that defendant's cross-motion for summary judgment with respect to the Snow file is denied as to the names of witnesses in the Snow investigation, the names of FBI support personnel, the names of other law enforcement personnel not covered by this court's interpretation of categorical balancing; and it is further

ORDERED that plaintiff's cross-motion for summary judgment with respect to the Snow file is granted in part and denied in part in that defendant need not release to plaintiff any FBI symbol source and file numbers, symbol numbers of confidential FBI informants, individual rap sheet information mentioned in defendant's Snow file, names of FBI informants or undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information; and it is further

ORDERED that a copy of the entire Snow file, redacted only to the extent ordered here, shall be delivered by defendant to the offices of plaintiff's counsel at 4 P.M., Feb. 15, 1991; and it is further

ORDERED that a copy of the entire Forni file, redacted only to the extent consistent with this court's November 29, 1990 opinion, shall be delivered by defendants to the offices of plaintiff's counsel at 4 P.M., Feb. 15, 1991; and it is further

ORDERED that this order supercedes this Court's Order of November 29, 1990; that Order is hereby vacated.

/s/ H. Lee Sarokin
H. LEE SAROKIN
U.S.D.J.



SUPREME COURT OF THE UNITED STATES

No. 91-2054

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

VINCENT JAMES LANDANO

**ORDER ALLOWING CERTIORARI**

Filed October 5, 1992

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

October 5, 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342472 60004

[redacted]

---

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

v.

VINCENT JAMES LANDANO

---

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

BRIEF FOR THE PETITIONERS

---


KENNETH W. STARR
*Solicitor General*

[redacted]
*Assistant Attorney General*

JOHN G. ROBERTS, JR.
*Deputy Solicitor General*

[redacted]
*Assistant to the Solicitor General*

LEONARD SCHAITMAN
[redacted]
*Attorneys*

*Department of Justice*
[redacted]


BEST AVAILABLE COPY

## QUESTION PRESENTED

Exemption 7(D) of the Freedom of Information Act, 5 U.S.C. 552(b)(7)(D), permits withholding of law enforcement information that "could reasonably be expected to disclose the identity of a confidential source" and, in a criminal investigation, information provided by such a source. The question presented is:

Whether, in light of the confidentiality that is inherent whenever the FBI gathers information during a criminal investigation, Exemption 7(D) protects all sources of such information, in the absence of record evidence negating the premise of confidentiality for a particular source.

## PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statutory provision involved | 2 |
| Statement | 2 |
| Summary of argument | 7 |
| Argument: | |
| The FBI satisfied its burden of sustaining the withholding of the requested documents under Exemption 7(D) of the Freedom of Information Act | 11 |
| A. The FBI's withholding of the documents is fully consistent with the text of Exemption 7(D) | 13 |
| B. The FBI's withholding of the documents furthers the consistent intent of Congress in enacting and amending Exemption 7 to provide firm protection for confidential law enforcement sources | 24 |
| 1. The Enactment of the FOIA In 1966 | 25 |
| 2. The 1974 Amendments | 25 |
| 3. The 1986 Amendments | 29 |
| C. Practical considerations strongly favor the use of realistic inferences in sustaining the application of Exemption 7(D) | 34 |
| D. Reliance on a presumption of confidentiality for sources of information in FBI criminal investigations is consistent with the FOIA's allocation of the burden of proof and with the role of presumptions in our legal system | 38 |
| Conclusion | 44 |

# TABLE OF AUTHORITIES

Cases: Page

*Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988) ..... 41, 42
*Brady* v. *Maryland*, 373 U.S. 83 (1963) ..... 2
*Brant Construction Co.* v. *EPA*, 778 F.2d 1258 (7th Cir. 1985) ..... 16
*CIA* v. *Sims*, 471 U.S. 159 (1985) ..... 24, 27
*Diamond* v. *FBI*, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984) ..... 12, 22, 36
*Donovan* v. *FBI*, 806 F.2d 55 (2d Cir. 1986) ..... 12, 36, 41
*Dow Jones & Co.* v. *Dep't of Justice*, 917 F.2d 571 (D.C. Cir. 1990) ..... *passim*
*EPA* v. *Mink*, 410 U.S. 73 (1973) ..... 34
*FBI* v. *Abramson*, 456 U.S. 615 (1982) ..... 25, 34, 38
*Ferguson* v. *FBI*, 957 F.2d 1059 (2d Cir. 1992) ..... 14
*FTC* v. *Grolier Inc.*, 462 U.S. 19 (1983) ..... 24, 34
*Gordon* v. *Thornburgh*, 790 F. Supp. 374 (D.R.I. 1992) ..... 20
*Hale* v. *United States Dep't of Justice*, 973 F.2d 894 (10th Cir. 1992) ..... 12, 14, 19, 21, 38
*Hopkinson* v. *Shillinger*, 866 F.2d 1185 (10th Cir. 1989) ..... 20
*Ingle* v. *Department of Justice*, 698 F.2d 259 (6th Cir. 1983) ..... 12, 19, 22
*Irons* v. *FBI*, 880 F.2d 1446 (1st Cir. 1989) ..... 12, 14, 19, 21, 33
*John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146 (1989) ..... 10, 13, 26, 34, 37
*Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514 (10th Cir. 1984) ..... 12, 19, 22
*Keeney* v. *FBI*, 630 F.2d 114 (2d Cir. 1980) ..... 16
*Keys* v. *Department of Justice*, 830 F.2d 210 (D.C. Cir. 1987) ..... 32, 38
*Kungys* v. *United States*, 485 U.S. 759 (1985) ..... 41
*Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981) ..... 5, 11, 30, 35, 37
*Landano* v. *United States Dep't of Justice*, cert. denied, No. 92-161 (Oct. 5, 1992) ..... 7



Cases—Continued: Page

*Landano* v. *Rafferty*, 782 F. Supp. 986 (D.N.J.), rev'd, 970 F.2d 1230 (3d Cir. 1992), cert. denied, No. 92-436 (Nov. 2, 1992) ..... 3
*Landano* v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990) ..... 3
*Landano* v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989) ..... 2
*Leary* v. *United States*, 395 U.S. 6 (1969) ..... 39-40
*Londrigan* v. *FBI*, 722 F.2d 840 (D.C. Cir. 1983) ..... 19
*Miller* v. *Bell*, 661 F.2d 623 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982) ..... 12, 18-19, 21, 22, 28, 38
*Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479 (11th Cir. 1992) ..... 12, 14, 19, 21, 24, 28, 36, 38, 39
*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) ..... 24, 34
*Parker* v. *Department of Justice*, 934 F.2d 375 (D.C. Cir. 1991) ..... 12, 19
*Radowich* v. *United States Attorney, Dist. of Maryland*, 658 F.2d 957 (4th Cir. 1981) ..... 16
*Schmerler* v. *FBI*, 900 F.2d 333 (D.C. Cir. 1990) ..... 12, 19, 36, 43
*Shaw* v. *FBI*, 749 F.2d 58 (D.C. Cir. 1984) ..... 14, 16, 19, 43
*Spannaus* v. *United States Dep't of Justice*, 813 F.2d 1285 (4th Cir. 1987) ..... 23
*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) ..... 41, 43
*United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ..... *passim*
*United States Dep't of State* v. *Ray*, 112 S. Ct. 541 (1991) ..... 5, 20
*United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984) ..... 38
*Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) ..... 12
*Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992) ..... 12

Statutes: Page

Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, §§ 1801-1804, 100 Stat. 3207-48 to 3207-51 ..... 29
§ 1802(b), 100 Stat. 3207-48 ..... 33
Freedom of Information Act:
5 U.S.C. 552 ..... 2
5 U.S.C. 552(a)(3) ..... 21
5 U.S.C. 552(a)(4)(B) ..... 10, 18, 39
5 U.S.C. 552(b)(6) ..... 3
5 U.S.C. 552(b)(7)(C) ..... 3
5 U.S.C. 552(b)(7)(D) ..... 3, 7
5 U.S.C. 552(c)(2) ..... 33

Miscellaneous:

*Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* (1987) ..... 29
*Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* (1975) ..... 28
120 Cong. Rec. 17,033-17,034 (1974) ..... 26
120 Cong. Rec. 17,036-17,040 (1974) ..... 27
120 Cong. Rec. 36,629 (1974) ..... 28
120 Cong. Rec. 36,866-36,867 (1974) ..... 28
120 Cong. Rec. 36,871 (1974) ..... 28
130 Cong. Rec. 3492-3521 (1984) ..... 32
132 Cong. Rec. 26,768-26,770 (1986) ..... 33
132 Cong. Rec. 27,189 (1986) ..... 32, 33
132 Cong. Rec. 27,191-27,192 (1986) ..... 33
132 Cong. Rec. 31,424 (1986) ..... 33
*Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents* (1975) ..... 26
*Freedom of Information Act: Hearings Before the Subcomm. of the Constitution, Senate Comm. on the Judiciary on S. 774*, 98th Cong., 1st Sess. (1983) ..... 30, 31, 32, 35



Miscellaneous—Continued: Page

*Freedom of Information Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) ..... 30, 31, 32
*Freedom of Information Act, Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) ..... 30, 31
*FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. (1980) ..... 29
H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. (1974) ..... 12, 28
H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1966) ..... 25, 39
*Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies*, GAO Rep. No. GGD-78-108 (1978) ..... 30
1 D. Louisell & C. Mueller, *Federal Evidence* (1977) ..... 41, 42
*Manual of Investigative Operations and Guidelines, Manual No. 2815* (Jan. 31, 1978) ..... 20
2 *McCormick on Evidence* (4th Ed. 1992) ..... 39, 40, 41
Subcomm. on Admin. Practice and Procedure, Senate Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* (1974) ..... 25
S. Rep. No. 221, 98th Cong., 1st Sess. (1983) ..... 23, 32, 33
S. Rep. No. 813, 89th Cong., 1st Sess. (1965) ..... 25, 34, 39
S. Rep. No. 854, 93d Cong., 2d Sess. (1974) ..... 26
S. Rep. No. 1200, 93d Cong., 2d Sess. (1974) ..... 6, 16
S. Rep. No. 1219, 88th Cong., 2d Sess. (1964) ..... 39
U.S. Dep't of Justice:
*Annual Report on Freedom of Information Activities* (May 1, 1992) ..... 35
*Annual Report on Freedom of Information Activities* (Apr. 25, 1991) ..... 35
*Webster's Third New International Dictionary* (1986) ..... 8, 15, 16

# In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2054

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

VINCENT JAMES LANDANO

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE PETITIONERS

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (Pet. App. 31a-47a, 48a-61a) are reported at 751 F. Supp. 502 and 758 F. Supp. 1021, respectively.

### JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. Pet. App. 62a-63a. The petition for a writ of certiorari was filed on June 22, 1992, and was granted on October 5, 1992. J.A. 45. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. 552, provides in pertinent part:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * *.

## STATEMENT

1. Respondent was convicted in New Jersey state court for the 1976 murder of John Snow, a New Jersey police officer. In September 1988 and January 1989, respondent filed requests with the Federal Bureau of Investigation (FBI) under the Freedom of Information Act (FOIA), 5 U.S.C. 552, for information that the FBI had compiled in the course of its involvement in the investigation.[1]

[1] Although the investigation was principally a state matter, the FBI became involved in part because of the need for interstate "unlawful flight" warrants to apprehend certain suspects. Respondent has insisted that Victor Forni was the actual killer and that New Jersey officials withheld exculpatory evidence, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963). Respondent's initial efforts to obtain habeas corpus relief in state and federal court were unsuccessful. *Landano* v. *Rafferty*, 670 F. Supp. 570 (D.N.J. 1987), aff'd, 856 F.2d 569 (3d Cir. 1988), cert. denied, 489 U.S. 1014 (1989). The federal district court subsequently granted relief,



In May 1990, the FBI released several hundred pages of documents, some of which contained redactions, and withheld several hundred other pages in their entirety. Material was withheld principally on the basis of FOIA Exemptions 6 and 7(C), 5 U.S.C. 552(b)(6) and (7)(C), which protect against unwarranted invasions of personal privacy, and Exemption 7(D), 5 U.S.C. 552(b)(7)(D), which protects confidential sources of law enforcement information.[2]

Respondent filed the present action in May 1990. J.A. 1; see Amended Complaint (J.A. 9-13). In support of their motion for summary judgment, the Department of Justice and the FBI (hereafter the FBI) submitted the declaration of Special Agent Regina M. Superneau, J.A. 18-42, which described the FBI's search for the requested

based upon allegations of newly discovered evidence; that ruling, however, was reversed because of respondent's failure to exhaust state remedies. *Landano* v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S. Ct. 46 (1990). Respondent is now pursuing those issues in the New Jersey courts. See Pet. App. 2a. Meanwhile, the court of appeals recently reversed an order of the district court in which it had taken the extraordinary step of ordering respondent's release on federal bail pending conclusion of those state proceedings. *Landano* v. *Rafferty*, 782 F. Supp. 986 (D.N.J.), rev'd, 970 F.2d 1230 (3d Cir. 1992), cert. denied, No. 92-436 (Nov. 2, 1992).

[2] The records released in May 1990 related to respondent's first and principal request, which was for all records concerning the investigation of Officer Snow's murder. Respondent's second FOIA request—for records specifically concerning Forni—was initially denied in its entirety under Exemption 7(C), because release of any such records would have been an unwarranted invasion of Forni's privacy. Forni subsequently consented to disclosure, and the FBI then reprocessed the second request without regard to Forni's privacy interests, but withheld portions of the requested records based on the same considerations under Exemptions 7(C) and 7(D) that the FBI invoked with respect to the principal request. The Exemption 7(D) rulings of the courts below related to both sets of records. Pet. App. 51a-52a.

records and the reasons for withholding various portions of them. The declaration discussed in detail the FBI's rationale for invoking a particular exemption for each category of information and assigned a code to each category. The same codes were then used to indicate, on a set of redacted documents, the reasons for each withholding. *Id.*, ¶¶ 17-20 (J.A. 26); see Pet. App. 37a-38a. For example, category "(b)(7)(D)-(3)" referred to individuals who provided information under implied or express promises of confidentiality, and to information provided by such persons. *Id.*, ¶¶ 24, 47-52 (J.A. 28, 37-40). The declaration also described in detail the FBI's need for cooperation by such persons, the inherent dangers they would confront if their identities or the information provided by them were released to the public, and the implicit assurances of confidentiality present whenever the FBI interviews individuals in the course of a criminal investigation. *Ibid.* Other categories of material for which the FBI invoked Exemption 7(D) included internal FBI source symbols for especially sensitive informants, identities of and information provided by informants who provided information to the FBI on a continuing basis, identities of and information provided by local law enforcement agencies, and identities of and information provided by financial or commercial institutions. *Id.*, ¶¶ 42-45, 53-56 (J.A. 33-37, 40-41); see Pet. App. 19a-20a.[3]

2. In a decision dated November 29, 1990, the district court sustained some of the FBI's withholdings, but

[3] Because respondent's second FOIA request had at that point been denied in its entirety on other grounds (see note 2, *supra*), the Superneau Declaration did not address the documents responsive to that request. The same issues arise with respect to those documents, however, and the district court extended its initial ruling to them without calling for a further FBI declaration. See Order of Dec. 13, 1990 (J.A. 43-44). The court of appeals in turn affirmed the district court's Exemption 7(D) rulings in their entirety. See Pet. App. 30a.



rejected many of its pivotal arguments under Exemptions 7(C) and 7(D). Pet. App. 31a-47a. With respect to Exemption 7(D), at issue here, the court held that the FBI's categorical explanations sufficed for certain witnesses and what it referred to as "undercover agents," but that for "all other information withheld by [the FBI] under [Exemption] (b)(7)(D), the court requires case-specific reasons for non-disclosure which were not supplied by [the FBI]." Pet. App. 45a.[4]

In response to the FBI's motion for reconsideration, the court reaffirmed its ruling and further explained its reasoning. Pet. App. 48a-61a. Citing the Third Circuit's ruling in *Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981), the district court held that the FBI must make a particularized showing regarding the circumstances of each individual source for which it invokes Exemption 7(D). It accordingly rejected the proposition that promises of confidentiality are "inherently implicit" whenever the FBI collects information in the course of a criminal investigation. Pet. App. 52a-55a.

3. A panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-30a. On the issue of invasion of personal privacy under Exemption 7(C), the court of appeals joined several other courts in recognizing that persons whose names appear in criminal law enforcement records necessarily have a significant privacy interest regarding the release of such information. *Id.* at 6a-7a. It also held that, under *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and *United States Dep't of State* v. *Ray*, 112 S. Ct. 541 (1991), there is no cognizable "public interest" in the disclosure of the records that the FBI withheld under Exemption 7(C), because there is no indication that they would reveal anything about the

[4] The court declined to conduct an *in camera* inspection of the documents themselves. Pet. App. 45a-46a.

workings of the FBI. The court of appeals accordingly reversed the district court's judgment insofar as it ordered release of information the FBI had withheld under Exemption 7(C). Pet. App. 9a-17a.

By contrast, the panel affirmed the district court's judgment insofar as it required release of information the FBI withheld under Exemption 7(D). Pet. App. 17a-30a. The panel recognized that Exemption 7(D) applies to all "confidential" sources, without resort to any balancing of interests. *Id.* at 18a. This principle, the panel noted, reflects the purpose of Exemption 7(D) "to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information." *Ibid.* The panel also recited the legislative history stating that Exemption 7(D) applies broadly to "citizen volunteer[s]," including both those expressly assured of confidentiality and those who provided information "in circumstances from which such an assurance could reasonably be inferred." *Id.* at 21a, 22a (quoting S. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)). And the panel recognized that the 1986 amendments to the FOIA—which permit an agency to withhold information that "could reasonably be expected to" disclose (rather than "would" disclose) the identity of a confidential source or information furnished by such a source in a criminal investigation—were intended to "lighten the agency's burden in invoking Exemption 7." *Id.* at 23a (citing *Reporters Committee*, 489 U.S. at 756 n.9).

The panel nevertheless rejected the FBI's submission that, in light of the sensitive nature of FBI criminal investigations, the very fact that a person furnished information to the FBI in the course of such an investigation is sufficient (in the absence of contrary evidence) to support an inference of confidentiality, and therefore to permit withholding under Exemption 7(D). While acknowledging conflicting decisions in a number of other circuits and characterizing the question as "difficult,"



Pet. App. 21a-22a, the panel deemed itself bound by the Third Circuit's prior decision in *Lame*, which it read to require "a showing by the government of the particular circumstances of an interview or source." *Id.* at 28a. The panel rejected the FBI's argument that *Lame*'s rationale had been superseded by *Reporters Committee*'s approval of a categorical approach to withholding under Exemption 7, and by the 1986 FOIA amendments' lessening of the government's burden under that exemption. *Id.* at 28a-29a.

4. Because of the importance of Exemption 7(D) in protecting confidential sources and ensuring the continued flow of law enforcement information—and in light of the panel's acknowledgement that its approach diverged from that of other courts of appeals—the FBI filed a petition for rehearing with suggestion of rehearing en banc, so that the full court of appeals could reconsider *Lame*. The court of appeals denied rehearing, even though a majority of the active judges voting (including Judge Stapleton, the author of the panel opinion) voted to rehear the case en banc. Pet. App. 62a-63a; see Pet. 7 & n.4.[5]

## SUMMARY OF ARGUMENT

The Federal Bureau of Investigation properly withheld the documents at issue in this case under Exemption 7(D) of the Freedom of Information Act, which protects "confidential sources" and information furnished by such sources in a criminal investigation. 5 U.S.C. 552(b)(7)(D). The vast majority of the courts of appeals that have addressed the issue have correctly held that the FBI may sustain withholding under this Exemption by establishing (as it did here) that the source furnished in-

[5] When the Court granted our certiorari petition on the Exemption 7(D) issue, it denied respondent's cross-petition challenging the Third Circuit's ruling on Exemption 7(C). *Landano* v. *United States Dep't of Justice*, cert. denied, No. 92-161 (Oct. 5, 1992).

formation in the course of a criminal investigation, because confidentiality is inherent in the very nature of an FBI interview in that setting.

A. The contrary ruling by the court of appeals in this case—that the FBI must support its invocation of Exemption 7(D) with "detailed explanations relating to each confidential source," Pet. App. 27a—imposes an evidentiary burden that appears nowhere in the text of FOIA itself. The courts of appeals (including the court below) have uniformly held that the FBI may invoke Exemption 7(D) not only where there was an express assurance of confidentiality, but also on the basis of circumstances from which such an assurance "could reasonably be inferred." An inference of confidentiality is compelled in the present context because sources who furnish information to the FBI in the course of a criminal investigation are almost invariably "confidential," both in the sense that their roles in the investigation are not widely known and in the sense that they furnish information "in confidence"—*i.e.*, "within a relation or state of trust or intimacy." *Webster's Third New International Dictionary* 476 (1986).

In this case, the FBI submitted a declaration describing the reasons an assurance of confidentiality could reasonably be inferred with respect to each category of sources who furnished information. Because weighty liberty and property interests are at stake in FBI criminal investigations, disclosure of the identities of sources or the information they furnish would inevitably create a risk of adverse consequences. The FBI's ability to elicit cooperation has therefore depended in large part upon its traditional ability to maintain confidentiality. Accordingly, a showing that a particular source provided information in the course of a criminal investigation is sufficient (in the absence of evidence to the contrary in the particular case) to support an inference that the source was, in fact, "confidential."



It is especially appropriate to permit withholding on the basis of inferences drawn from such a showing in light of the 1986 amendments to Exemption 7(D), which require the FBI to show only that release of the records "could reasonably be expected to" disclose a confidential source or information furnished by such a source. As this Court recognized in *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), that standard supports use of categorical or inferential approaches in applying Exemption 7.

B. A presumption of confidentiality for sources in criminal investigations also finds strong support at each stage of FOIA's statutory evolution. Beginning with the enactment of FOIA in 1966, Congress has evinced an abiding concern that the Act's policies of open government not be permitted to endanger the effectiveness of vital law enforcement activities or impede the continued flow of information to the FBI and other federal law enforcement agencies. Although the 1974 amendments to FOIA restructured Exemption 7 to make its coverage more well defined, they reaffirmed the Exemption's purpose to protect a broad range of confidential sources. Congress enacted those amendments with full awareness of the FBI's tradition of confidentiality, and the Conference Report makes clear that confidentiality may be inferred from the circumstances in which information was furnished.

The nature and legislative history of the 1986 amendments to FOIA further support a realistic presumption of confidentiality in order to ensure effective protection of FBI sources. Those amendments were enacted against the background of extensive testimony by federal law enforcement officials concerning the unwillingness of many potential sources to provide information because of their perception that FOIA prevented federal agencies from maintaining the confidentiality of their sources. Congress appreciated the gravity of the threat to effective law en-

forcement and intended to ease the burden of federal agencies in invoking Exemption 7.

C. The approach we urge is also consistent with the Court's repeated recognition of the need for "workable rules" under the FOIA and the need to ensure that its Exemptions are given "meaningful reach and application." See *Reporters Committee*, 489 U.S. at 779; *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989). The court of appeals' requirement of source-specific factual showings in each instance of withholding under Exemption 7(D) is unworkable, because it would impose an enormous and unnecessary burden on federal agencies and federal courts. It also would effectively preclude protection for many confidential sources, because the passage of time and limited documentation would frequently make it impossible for the FBI to meet the standard the court has imposed. Moreover, to allow protection for confidential sources to depend upon *post hoc* judicial second-guessing of the circumstances of individual law enforcement encounters would render the protection of Exemption 7(D) unpredictable, thereby frustrating Congress's intent to preserve the flow of law enforcement information by reassuring potential sources of the FBI's ability to preserve their confidences.

D. The use of a presumption of confidentiality is fully consistent with FOIA's imposition of the burden of proof on the agency seeking to sustain the withholding of records. See 5 U.S.C. 552(a)(4)(B). An inference of confidentiality regarding FBI criminal investigations comports with the preponderance of the evidence standard used in civil litigation, because the FBI's demonstration that a source provided information in the course of such an investigation makes it more likely than not (in the absence of contrary evidence) that the source was in fact "confidential." Recognition of a presumption to this effect also accords with general principles regarding the use of presumptions, based upon probabilities, the difficulty of adducing direct proof, and the furtherance of relevant statutory policies. Finally, as the Federal Rules of Evidence and decisions of this Court make clear, recognition of such a presumption does not shift the ultimate burden of persuasion, which remains on the party (here the FBI) that has the underlying burden. At the same time, a presumption of confidentiality substantially furthers the purpose of Exemption 7(D) of promoting the flow of information upon which the FBI and other law enforcement agencies depend for their vital work.



## ARGUMENT

### THE FBI SATISFIED ITS BURDEN OF SUSTAINING THE WITHHOLDING OF THE REQUESTED DOCUMENTS UNDER EXEMPTION 7(D) OF THE FREEDOM OF INFORMATION ACT

Exemption 7(D) of the FOIA protects law enforcement information that "could reasonably be expected to disclose the identity of a confidential source" and, in the case of information compiled in a criminal investigation, "information furnished by a confidential source." The court of appeals, adhering to its prior ruling in *Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981), held that any invocation of this Exemption by the FBI must be supported by " 'detailed explanations relating to each alleged confidential source' "—"a showing by the government of the particular circumstances of an interview or source." Pet. App. 27a, 28a (quoting 654 F.2d at 928). This holding imposes upon the FBI an evidentiary burden that appears nowhere in the text of the FOIA and that is contrary to Exemption 7(D)'s purpose of securing maximum protection for the confidentiality of sources in criminal investigations.

In contrast to the Third Circuit, the vast majority of the courts of appeals that have addressed the issue have recognized that individualized, source-specific showings of the sort contemplated by the decision below and *Lame* are

unnecessary, because confidentiality is implicit in the very nature of an FBI interview conducted in the course of a criminal investigation. See *Parker* v. *Dep't of Justice*, 934 F.2d 375, 378 (D.C. Cir. 1991); *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571, 575-577 (D.C. Cir. 1990); *Schmerler* v. *FBI*, 900 F.2d 333, 337 (D.C. Cir. 1990); *Donovan* v. *FBI*, 806 F.2d 55, 61 (2d Cir. 1986); *Diamond* v. *FBI*, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984); *Ingle* v. *Department of Justice*, 698 F.2d 259, 269 (6th Cir. 1983); *Miller* v. *Bell*, 661 F.2d 623, 627 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982); *Hale* v. *United States Dep't of Justice*, 973 F.2d 894, 899 (10th Cir. 1992); *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514, 1517-1518 (10th Cir. 1984); *Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479, 1484-1487 (11th Cir. 1992); see also *Irons* v. *FBI*, 880 F.2d 1446, 1447 (1st Cir. 1989) (en banc) (dictum).[6] Under these decisions, a showing by the FBI that a source furnished information in the course of a criminal investigation is sufficient in itself to establish its prima facie case (or raise a presumption of confidentiality) under Exemption 7(D), thereby entitling the FBI to summary judgment unless the requester produces affirmative evidence that rebuts the inference of confidentiality in the particular case. The accumulated wisdom of these decisions respects the text and purposes of Exemption 7(D), the practicalities of FOIA administration and litigation, and the role of presumptions in our legal system.

[6] In *Wiener* v. *FBI*, 943 F.2d 972 (9th Cir. 1991), cert. denied, 112 S. Ct. 3013 (1992), the Ninth Circuit appeared to leave open the possibility of recognizing a "presumption" of confidentiality regarding FBI criminal investigations. *Id.* at 987 n.29. But the court nevertheless rejected the FBI's invocation of Exemption 7(D) on the ground that it had failed to provide in its *Vaughn* index (see *Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974)) a description of "the facts and circumstances surrounding the receipt of information from informants." 943 F.2d at 987.



### A. The FBI's Withholding Of The Documents Is Fully Consistent With The Text Of Exemption 7(D)

In applying the FOIA, as any federal statute, the Court's inquiry must begin with "the language of the statute itself." *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 153 (1989). Exemption 7(D) protects from mandatory disclosure "law enforcement information" that--

> could reasonably be expected to disclose [1] the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and [2], in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * *.

The FBI fully satisfied its burden under this exemption.

1. As an initial matter, the documents in question satisfy the general threshold requirement for protection under Exemption 7, because they were "compiled for law enforcement purposes." See Pet. App. 39a-40a; *John Doe Agency*, 493 U.S. at 148, 153-157. The documents also satisfy the specific threshold requirement for protection under the second clause of Exemption 7(D), because they were "compiled by criminal law enforcement authority [the FBI] in the course of a criminal investigation [the investigation of the murder of Officer Snow]." Superneau Decl. ¶¶ 12-14 (J.A. 23-24); Pet. App. 20a-21a & n.3.

Exemption 7(D) provides broad protection for such records insofar as they relate to "confidential sources." That protection is afforded not only to the identities of the "confidential sources" themselves, but also to any and all information they may have provided. Pet. App. 18a.

As a result, if the material was obtained in a criminal investigation, any given piece of information may be withheld if it could reasonably be expected to identify a confidential source, *or* if it could reasonably be expected to reveal any information provided by a confidential source. See *Ferguson* v. *FBI*, 957 F.2d 1059, 1069 (2d Cir. 1992); *Irons* v. *FBI*, 880 F.2d at 1448; *Shaw* v. *FBI*, 749 F.2d 58, 61 (D.C. Cir. 1984) (Scalia, J.). Furthermore, Exemption 7(D), unlike Exemption 7(C), does not permit a court to balance competing interests; it protects confidential sources and the information they furnished "no matter how strong the public interest in disclosure." Pet. App. 18a; see also *Hale*, 973 F.2d at 899; *Ferguson*, 957 F.2d at 1069; *Nadler*, 955 F.2d at 1487 n.8.

As the court below pointed out, this extra measure of security for criminal investigations "reflects the fact that the purpose of Exemption 7(D) is to protect the ability of law enforcement agencies to obtain the cooperation of persons with relevant information." Pet. App. 18a. It does so by eliminating any possibility that a confidential source might be identified indirectly through release to a knowledgeable requester of information that only that particular source could have furnished. See Superneau Decl. ¶ 50 (J.A. 38-39).[7] Nothing in Exemption 7(D)'s deliberately sweeping language suggests that the FBI must make a detailed showing regarding the circumstances of each interview or source in order to invoke the prophylactic protection the exemption affords.

[7] The breadth of Exemption 7(D) is also reflected in the key statutory term "confidential source." Congress's intention not to limit the exemption's coverage to the archetypal back-alley "informant" is demonstrated by its use of the all-encompassing term "source" (see also pages 26, 28, *infra*) and by its express inclusion of private institutions and state and local governments, as well as natural persons, among the "confidential sources" afforded protection.



2. The first clause of Exemption 7(D) permits withholding of information if its release "could reasonably be expected to disclose the identity of a confidential source," and the second clause permits withholding if release could reasonably be expected to disclose "information furnished by a confidential source" in a criminal investigation. Both clauses refer to the confidentiality of the *source*, not the interview or the information it yields. *Dow Jones*, 917 F.2d at 578. They therefore do not support the court of appeals' view (see Pet. App. 20a, 21a n.3, 24a, 26a) that the FBI was required to produce evidence concerning its interviews with each source.

Furthermore, under any of the ordinary meanings of the term "confidential" as used in Exemption 7(D), it is apparent that the FBI can make a proper showing of confidentiality without engaging in the sort of source-by-source description upon which the court below insisted. Under one reading of the term, a source is "confidential" if his identity as such is "known only to a limited few" and is "not publicly disseminated." *Webster's Third New International Dictionary* 476 (1986). Persons who furnish information to the FBI in criminal cases will almost invariably meet that test. Because the FBI's declaration established (and the courts below and respondent have not disputed) that the sources in this case furnished information in a criminal investigation—and because respondent produced no evidence showing that the identity of any source nevertheless *was* widely "known" or "publicly disseminated"—no particularized showing was needed to establish that the sources are "confidential" in that sense.

Alternatively, the word "confidential" may mean "communicated, conveyed, acted on, or practiced in confidence." *Webster's New Third International Dictionary* 476 (1986). This meaning of "confidential" fits especially well in the present context, because Exemption 7(D) focuses on the transmission of information to the FBI and other law

enforcement agencies by outside "sources."[8] A "confidential source" in this sense is one who transmits information to the agency "in confidence"—*i.e.*, "within a relation or state of trust or intimacy." See *Webster's Third New International Dictionary* 476 ("confidence," def. 6).[9] Exemption 7(D) itself furnishes textual support for this interpretation, because it includes among confidential sources those governmental and private institutions that have "furnished information on a confidential basis."

In applying Exemption 7(D)'s reference to "confidential sources," the courts have uniformly recognized that the trust or confidence at issue need not be based on express assurances of confidentiality by federal law enforcement officials. On the contrary, relying on the Conference Report on the 1974 amendments to Exemption 7, the courts have agreed with the court below that a source must be considered "confidential" if the source "provided information under an express assurance of confidentiality *or* in circumstances from which such an assurance could reasonably be inferred." Pet. App. 22a (quoting S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)) (emphasis added); see cases cited at page 12, *supra*; *Brant Construction Co.* v. *EPA*, 778 F.2d 1258, 1263 (7th Cir. 1985) (collecting cases).

---

[8] "Confidential" may have this meaning regardless of whether it refers to information (see *Shaw* v. *FBI*, 749 F.2d at 61) or to sources of information. *Shaw* itself dealt with Exemption 7(D)'s former reference to "confidential information." Deletion of "confidential" in that phrase was one of several amendments that Congress made in 1986 in an effort to clarify and broaden the exemption and render its protections more secure. See pages 29-33, *infra*.

[9] See also *Radowich* v. *United States Attorney, Dist. of Maryland*, 658 F.2d 957, 959 (4th Cir. 1981) ("given in confidence" or "in trust"); *Keeney* v. *FBI*, 630 F.2d 114, 119 n.2 (2d Cir. 1980) ("reposing confidence or trust").



3. The remaining question, then, is under what circumstances it "could reasonably be inferred" that the source provided information to the FBI in confidence. Having erroneously decided to adhere to its holding in *Lame* that an individualized showing is required for each source, the court of appeals failed to resolve that issue directly. See Pet. App. 26a. The court nonetheless appreciated the common sense of such an inference, because, "[a]fter all, the FBI is generally known to involve itself only in significant criminal matters and this means that in any FBI investigation, there are likely to be persons who have motives for resenting those who cooperate with it." *Id.* at 25a. The record in this case confirms the common sense of such an inference and demonstrates that the FBI carried its burden of sustaining its withholding of the documents.

a. The declaration submitted by the FBI in the district court explained fully the FBI's reasons for treating the sources at issue as "confidential" under Exemption 7(D). See Superneau Decl. ¶¶ 42-55 (J.A. 33-41). Addressing sources by groups keyed to coded excisions in the documents, the declarant—the supervisory FBI agent responsible for processing this FOIA request—explained in detail the considerations that justified "confidential" status. First, she described the need for confidentiality with respect to the names and internal codes of "informants" from whom the FBI received information on a regular basis under express assurances of confidentiality. See *id.*, ¶¶ 43-46 (J.A. 34-37).[10] The declarant went on to address the situation of other individuals who provide information to the FBI in the course of criminal investiga-

---

[10] The district court appears to have accepted this portion of the FBI's Exemption 7(D) claims, espousing a "presumption of confidentiality" regarding "undercover FBI agents or FBI informants." See Pet. App. 54a. In light of the express assurance of confidentiality for these informants, it is not apparent why the district court adverted to a "presumption."

tions. *Id.*, ¶¶ 47-52 (J.A. 47-52). Because cooperation by such individuals ordinarily is voluntary and the information they furnish is potentially quite harmful to persons who "may lose substantial liberty or property interests," any assistance they render to the FBI entails an inherent risk of reprisal, harassment, or public embarrassment. *Id.*, ¶ 49 (J.A. 37-38). "In order that the FBI's investigative responsibilities are not deterred, persons being interviewed must be assured, either expressly or implicitly, that the information received will be held in the strictest of confidence." *Id.*, ¶ 47 (J.A. 37); see also ¶ 49 (J.A. 37-38) ("Persons providing information * * * should be secure in the knowledge that, absent the necessity of * * * public testimony, with its attendant judicial restraints and protections, their assistance and their identities will be held in confidence. * * * These considerations have been met by the traditional willingness and ability of the FBI to assure persons interviewed that their identities would be protected."); note 13, *infra*.

b. As the court below acknowledged, the overwhelming majority of courts of appeals to have considered the question have recognized that such a showing by the FBI—based upon its long experience in eliciting the cooperation of potential witnesses and other sources and its traditional practices regarding confidentiality—amply supports an inference that a given source of information in a criminal investigation qualifies as "confidential," at least in the absence of specific evidence to the contrary. See Pet. App. 21a-22a (collecting cases), 30a; page 12, *supra*. In the seminal case of *Miller* v. *Bell*, the Seventh Circuit considered a similar showing on the FBI's part and readily concluded that the FBI had met its burden under 5 U.S.C. 552(a)(4)(B) to sustain the withholding. The court explained that "[u]nless there is evidence to the contrary in the record, we believe such promises of confidentiality are inherently implicit in FBI interviews conducted pursuant to a criminal investigation." 661



F.2d at 627. This judicial confirmation of "inherently implicit" confidentiality, in which numerous other courts have joined,[11] rests on a realistic appraisal of routine law enforcement practices and the legitimate expectations of persons willing to impart information to the FBI: "The FBI has a long-standing policy of treating as confidential all information obtained during the course of an investigation," *Nadler*, 955 F.2d at 1486; see *Londrigan* v. *FBI*, 722 F.2d 840, 843-844 (D.C. Cir. 1983), "and rarely—if ever—will a source not desire" that protection, *Dow Jones*, 917 F.2d at 577.[12] Sources who provide information to the FBI in these circumstances—be they individuals, private institutions, or state and local governmental entities[13]—accordingly have (and should continue to have)

[11] See *Parker*, 934 F.2d at 378; *Dow Jones*, 917 F.2d at 576; *Schmerler*, 900 F.2d at 337; *Keys*, 830 F.2d at 345; *Ingle*, 698 F.2d at 269; *Hale*, 973 F.2d at 899; *Johnson*, 739 F.2d at 1517-1518; *Nadler*, 955 F.2d at 1486; *Irons*, 880 F.2d at 1447 (dictum).

[12] Contrary to the suggestion below (Pet. App. 26a), these considerations also apply to seemingly "routine FBI interviews." It is difficult to anticipate all the ways in which release of criminal law enforcement information may prove harmful, and there is thus a strong basis for implied assurances of confidentiality even concerning the provision of "innocuous and favorable background and character information." *Dow Jones*, 917 F.2d at 576; *Schmerler*, 900 F.2d at 337-338. The present case—involving the murder of a police officer, with reports of gang involvement—vividly illustrates the sensitivity that often accompanies the very fact of cooperation with the FBI. See Pet. App. 25a-26a n.5. Furthermore, any suggestion that the applicability of Exemption 7(D) should hinge on an *ad hoc* evaluation of the sensitivity of the information would be contrary to the principle that "the availability of Exemption 7(D) depends not upon the factual contents of the document sought, but upon whether the *source* was confidential." *Shaw*, 749 F.2d at 61; see also *Schmerler*, 900 F.2d at 338.

[13] Although the reported decisions have discussed this issue principally with respect to individual sources, the assumption of confidentiality is every bit as strong in communications between law enforcement agencies. The FBI is particularly well positioned to

every reason to expect that the information will be maintained in confidence,[14] and not be made freely available to the public.[15]

---

assess the "traditional understanding of confidentiality" that exists in that setting, and its judgment that release of information obtained from other agencies would "seriously jeopardize[]" the free exchange of information was unrebutted below. See Superneau Decl., ¶ 54 (J.A. 40); see also *Gordon* v. *Thornburgh*, 790 F. Supp. 374, 377-378 (D.R.I. 1992); *Hopkinson* v. *Shillinger*, 866 F.2d 1185, 1222 (10th Cir. 1989). The continued receipt of information from financial and commercial institutions and other private entities likewise depends on the FBI's tacit "assurance that their cooperation will not be publicly exposed," which could lead to retaliation in the form of lawsuits, loss of business, etc. Superneau Decl., ¶ 55 (J.A. 41).

[14] The court below speculated that an inference of confidentiality might not be warranted even under the approach we urge because the record "does not affirmatively reflect that the interviewees knew their interviewer was an FBI agent and knew the purpose for which the information was sought." Pet. App. 25a n.4. Such speculation was misplaced, because the identification of FBI agents as such is so well-known and routine a part of FBI interviews that the sort of recitations envisioned by the court would be superfluous. See FBI, *Manual of Investigative Operations and Guidelines, Manual No. 2815* (Jan. 31, 1978) (Section 7 (Interviews), item 7-1 (Use of Credentials for Identification): "Credentials (commissioner cards) shall be exhibited to all persons interviewed by Special Agents so there will be no doubt concerning the organization with which they are connected."). The courts may properly presume that FBI agents followed those instructions when they interviewed sources in the course of investigating the murder of Officer Snow. Cf. *United States Dep't of State* v. *Ray*, 112 S. Ct. 541, 550 (1991) (presumption of regularity).

[15] As the court of appeals correctly recognized, a source need not have an absolute expectation of confidentiality in order to qualify as a "confidential source" under Exemption 7(D). Pet. App. 24a-25a; see *Dow Jones*, 917 F.2d at 579 (Silberman, J., concurring in denial of rehearing en banc); Superneau Decl. ¶ 49 (J.A. 37-38). Various aspects of the criminal justice process—such as the need to share information with other investigative personnel, to reveal it to criminal defendants, or to introduce it at trial—will necessitate disclosure to some individuals. But those potentialities in no



Regardless of whether this rule is framed as a "presumption" (see *Dow Jones*, 917 F.2d at 579; *Hale*, 973 F.2d at 899; *Nadler*, 955 F.2d at 1486) or as the nature of the FBI's "prima facie case" (see Pet. App. 23a-24a), it is eminently sensible. Because confidentiality has long been assumed whenever the FBI obtains information from sources in the course of a criminal investigation, a showing by the FBI that a particular record relates to information provided in those circumstances is more than sufficient to support a reasonable inference—to make it more likely than not—that the source is a "confidential" one. To be sure, there may be instances in which the particular circumstances will demonstrate that the usual inference of confidentiality is not warranted, and decisions applying a "presumption" have consistently recognized that it may be rebutted. See *Dow Jones*, 917 F.2d at 576-577; *Nadler*, 955 F.2d at 1487.[16] But where, as here, the requester has introduced no evidence to refute the reasonable supposition that persons who provide information to the FBI in the course of a murder investigation do so under an implied assurance of con-

---

way contradict the expectation that such information will not be made available "to any person," which is the result under the FOIA unless the information is exempt. 5 U.S.C. 552(a)(3). Moreover, as the en banc First Circuit recognized in *Irons*, 880 F.2d at 1448-1456, even public testimony by a witness cannot "waive" confidentiality under Exemption 7 as to any information beyond that actually disclosed. Accordingly, there is no merit to the argument, made by respondent below, that his *Brady* claim somehow precludes confidential treatment of the records at issue; under the FOIA, respondent has no greater right to the materials he seeks than would any other member of the public. *Reporters Committee*, 489 U.S. at 771.

[16] In *Miller*, the Seventh Circuit found that the plaintiff had successfully rebutted the presumption as to one source by producing the source's affidavit stating that she had not been led to believe that information she gave was taken on an implied promise of confidentiality. The court construed the source's affidavit as a waiver of confidentiality. See 661 F.2d at 627-628.

fidentiality, the FBI is entitled to summary judgment on its invocation of Exemption 7(D).

4. The foregoing principles properly implemented Exemption 7(D) even prior to the 1986 amendments to the FOIA, when the FBI had the burden under Exemption 7(D) of proving that disclosure "would" identify a confidential source or reveal information provided by such a source. Indeed, several of the leading cases expressly or effectively applying a presumption of confidentiality were decided prior to the 1986 amendments. See *Miller*, 661 F.2d at 627; *Ingle*, 698 F.2d at 269; *Johnson*, 739 F.2d at 1517-1518; *Diamond*, 707 F.2d at 78. Congress's substitution in 1986 of the phrase "could reasonably be expected to" disclose for "would" disclose renders that approach all the more sound. See pages 29-33, *infra*.

The court below erroneously dismissed this new language in Exemption 7(D) as irrelevant because it did not alter the *definition* of "confidential source." See Pet. App. 23a, 29a. The pivotal issue in this case is not the meaning of "confidential source" (as to which there is general agreement), but the nature of the FBI's *evidentiary burden* in an Exemption 7(D) case. The amended statutory language is highly relevant on that issue. The court of appeals itself acknowledged that the amended language concerns "the degree of risk of confidential source disclosure Congress was willing to accept," Pet. App. 29a, but failed to appreciate that it encompasses more than one kind of risk.

One form of uncertainty covered by the amended language arises where the requested information does not expressly identify the source, but "could reasonably be expected to" do so if disclosed because it contains potentially identifying clues. A different (but no less pertinent) form of uncertainty is present here. Where, as is typically the case, the FBI has information that a person provided in the course of a criminal investigation but has little or no direct evidence of the circumstances under which he did so, it nonetheless is very likely as an empirical matter (given the nature of criminal investigations generally) that the person qualifies as a "confidential source." It may be difficult in a given case to prove with a high degree of certainty that the particular source is confidential, and therefore that production of the requested records "would" disclose the identity of confidential sources or the information they provided. But under the 1986 amendments, the FBI need only show that such a consequence "could reasonably be expected." This language naturally encompasses the situation presented here, in which disclosure concededly would identify a source, and it is highly likely (even if perhaps not certain) that the source is in fact "confidential."



This Court, in *Reporters Committee*, has already recognized the relationship between the "could reasonably be expected to" language—which was inserted in 1986 into several subparts of Exemption 7—and the level of specificity needed to invoke its protection. In *Reporters Committee*, the Court considered the application of Exemption 7(C) to FBI "rap sheets." In light of the nature of the information in rap sheets—disclosure of which would invariably engender some invasion of privacy, yet would not ordinarily provide the public with any meaningful information about the conduct of the FBI—the Court concluded that a "categorical" approach was appropriate. It accordingly held that rap sheets as a class are protected by Exemption 7(C), without any need for a case-by-case analysis. 489 U.S. at 776-778. The Court found specific support for a categorical approach to Exemption 7 in the 1986 amendments, which were "intended to replace a focus on the effect of a particular disclosure 'with a standard of reasonableness . . . based on an objective test.'" *Id.* at 778 n.22 (quoting S. Rep. No. 221, 98th Cong., 1st Sess. 24 (1983)); cf. *Spannaus v. United States Dep't of Justice*, 813 F.2d 1285, 1288-1289 (4th Cir. 1987) (discussing effect of 1986 FOIA amendments on Exemption 7(A)).[11]

[11] The Court has repeatedly upheld the use of a categorical showing regarding the application of other FOIA exemptions, even

The court below believed that *Reporters Committee* is irrelevant here because it involved the Exemption 7(C) "balancing" test. Pet. App. 29a. Other courts addressing the same issue, however, have properly recognized the importance of *Reporters Committee* in confirming the propriety of categorical analyses under Exemption 7(D) as well. See *Dow Jones*, 917 F.2d at 577, 579; *Nadler*, 955 F.2d at 1486-1487 n.7. As the latter court explained, "the congressional requirement * * * of confidentiality does not prevent a categorical determination that sources in an FBI criminal investigation are presumptively confidential." *Ibid.* The court of appeals' contrary ruling, requiring individualized, source-by-source showings, is nothing other than a judicially engrafted addition to the text of the FOIA itself."

### B. The FBI's Withholding Of The Documents Furthers The Consistent Intent Of Congress In Enacting And Amending Exemption 7 To Provide Firm Protection For Confidential Law Enforcement Sources

The entire history of Congress's consideration of the FOIA—from its initial enactment in 1966 through its most recent amendment in 1986—shows an abiding congressional concern that the Act's policies of open government not be permitted to endanger the effectiveness of vital law enforcement activities. The approach to Exemption 7(D) that we urge and that most lower federal courts have embraced substantially furthers that overriding purpose.

where the text of the particular exemption does not directly speak to the point. See *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 223-224 (1978) (Exemption 7(A), prior to 1986 amendments); *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 27-28 (1983) (Exemption 5); *Reporters Committee*, 489 U.S. at 776-779 (discussing *Robbins Tire* and *Grolier*). *A fortiori*, a categorical approach is warranted here, because Congress in 1986 specifically eased the government's burden of proof by requiring only a showing that disclosure "could reasonably be expected to" lead to the identified harm.

[18] Compare *CIA* v. *Sims*, 471 U.S. 159, 174-177 (1985) (rejecting the D.C. Circuit's requirement that the CIA can withhold information about "intelligence sources" only if it shows that the information would have been unattainable without a promise of confidentiality).



#### 1. *The Enactment Of The FOIA In 1966.*

In recommending passage of the FOIA in 1966, the House committee emphasized that "[i]t is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 6 (1966), *reprinted in* Subcomm. on Admin. Practice and Procedure, Senate Comm. on the Judiciary, *Freedom of Information Act Source Book: Legislative Materials, Cases, Articles* 27 (1974) [*Source Book*]. Thus, while a citizen has a right to know "how his Government is operating," he also has a "right to confide in his Government." *Ibid.*

One of the "workable standards" that Congress established to effectuate this balance was Exemption 7, which was intended to apply to all "investigatory files compiled for law enforcement purposes," including, of course, "Federal Bureau of Investigation files." See H.R. Rep. No. 1497, *supra*, at 2 (*Source Book* at 23). In fact, this Court has specifically noted Congress's recognition in 1966 that "[i]t is * * * necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation." *FBI* v. *Abramson*, 456 U.S. 615, 631 (1982) (quoting S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965) (*Source Book* at 38)).[19]

#### 2. *The 1974 Amendments.*

The express protection in Exemption 7(D) for "confidential sources" has its genesis in the 1974 amendments

[19] President Johnson echoed those sentiments when he signed the FOIA into law, observing that "[a] citizen must be able in confidence to complain to his Government and to provide information." *Source Book* at 195.

to the FOIA, Pub. L. No. 93-502, 88 Stat. 1561 (1974), which restructured Exemption 7 to provide that records may be withheld only if they meet a threshold test of being compiled for "law enforcement purposes" and also fall into one of several specific categories. The amendments responded in large part to certain lower court decisions that appeared to exempt virtually all law enforcement records from disclosure, and they were particularly designed to prevent use of Exemption 7 "to commingle otherwise nonexempt materials with exempt materials in a law enforcement investigatory file." *John Doe Agency*, 493 U.S. at 156. Although the amendments tailored Exemption 7 in several respects, they evince a continued purpose to protect law enforcement interests, especially in the core area FBI criminal investigations.

a. Because the 1974 amendments initially addressed other issues,[20] the revisions of Exemption 7 were offered as a floor amendment by Senator Hart. 120 Cong. Rec. 17,033-17,034 (1974) (*Source Book II* at 332-335). His version of Exemption 7(D) differed significantly from the one ultimately enacted: it referred to "informer[s]" rather than "confidential sources," and it made no provision for withholding all information furnished by a confidential source. *Id.* at 17,033 (*Source Book II* at 332). Even so, Senator Hart stated that his proposal constituted no "radical departure" from the then-existing treatment of law enforcement materials. *Id.* at 17,034 (*Source Book II* at 334).

Opponents of the amendment noted the great importance to FBI investigations of private citizens' coming forward with information, and reminded the Senate that it is the normal practice of the FBI to treat information

[20] See, *e.g.*, S. Rep. No. 854, 93d Cong., 2d Sess. (1974), *reprinted* in Comm. on the Judiciary, United States Senate, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts, and Other Documents* 153-215 (1975) (*Source Book II*).



received in this manner as confidential. See 120 Cong. Rec. 17,036, 17,038 (1974) (Sen. Hruska) (*Source Book II* at 340, 348). Senator Thurmond stated:

> The FBI has always staked its high reputation on the fact that information given to it in confidence is kept secret. It is just such assurance as this that encourages individuals from all walks of life to furnish this agency information * * *.

*Id.* at 17,037 (*Source Book II* at 343). The proponents did not dispute the importance of citizen cooperation and the tradition of FBI confidentiality; they instead insisted that the amendment would not adversely affect those interests. The amendment's thrust, Senator Kennedy explained, was that the FOIA should be "specific about safeguarding * * * the investigative files of the FBI." *Id.* at 17,039 (*Source Book II* at 349). Senator Hart responded to the concerns in a similar manner:

> The Bureau stresses the need for confidentiality in its investigations. I agree completely. All of us recognize the crucial law enforcement role of the Bureau's unparalleled investigating capabilities.
>
> However, my amendment would not hinder the Bureau's performance in any way. * * * [The amendment] was carefully drawn to preserve every conceivable reason the Bureau might have for resisting disclosure of material in an investigative file.

*Id.* at 17,040 (*Source Book II* at 351). Senator Hart also stressed that "[i]f informants' anonymity—whether paid informers or citizen volunteers—would be threatened, there would be no disclosures." *Ibid.*

b. Although the Senate passed the floor amendment, 120 Cong. Rec. 17,040 (1974) (*Source Book II* at 351-352), the conference committee, at the request of President Ford, reopened discussion on several key points, including President Ford's concerns about the possible effects of the Exemption 7 amendments on the FBI. See Letters between President Ford and Senator Kennedy (Aug. 20 and Sept. 23, 1974) (*Source Book II* at 368-372). To

meet the President's concerns, the committee made "major changes." 120 Cong. Rec. 36,871 (1974) (Sen. Hart) (*Source Book II* at 451). One such change was that, in addition to protecting the identity of confidential sources, Exemption 7(D) would protect *all* information provided by such sources in criminal and national security investigations. Explaining the modest burden that the FBI would have under this provision, Senator Hart stated that "all the FBI has to do is to state that the information was furnished by a confidential source and it is exempt." *Ibid.* The conference committee also substituted "confidential source" for "informer," and explained that this change was being made—

> to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality *or in circumstances from which such an assurance could be reasonably inferred.*

H.R. Conf. Rep. No. 1380, *supra*, at 12 (*Source Book II* at 230) (emphasis added).

c. The rule we urge—recognizing the confidentiality that is inherent whenever an individual furnishes information to the FBI in a criminal investigation—meets the concerns expressed throughout the consideration of Exemption 7(D) in 1974. Indeed, lower courts adopting this rule have relied extensively on the legislative history of the 1974 amendments. See, *e.g.*, *Nadler*, 955 F.2d at 1485; *Miller*, 661 F.2d at 626-627.[21] For even as Congress narrowed Exemption 7 in certain respects, it reaffirmed its commitment to strike a workable balance between openness in government and the need for confidentiality in criminal law enforcement.

[21] Sponsors consistently gave assurances that the amendments contained "safeguards" for law enforcement activities and denied any intention to impede the FBI's ability to protect sources by imposing unrealistic burdens. See 120 Cong. Rec. 36,629 (Rep. Erlenborn) (*Source Book II* at 420-421); *id.* at 17,040, 36,629 36,866-36,867, 36,871 (Sens. Kennedy & Hart) (*Source Book II* at 350, 351, 420-421, 440, 450-451); *id.* at 36,623 (Rep. Moorhead) (*Source Book II* at 406); see also *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* 10 (1975) (*Source Book II* at 520) ("In most circumstances, it would be proper to withhold the name, address and other identifying information of a citizen who submits a complaint or report indicating a possible violation of law.").



### 3. *The 1986 Amendments.*

The 1986 amendments to the FOIA[22] further underscore the propriety of employing a presumption of confidentiality for sources who furnish information in the course of criminal investigations. Contrary to the court of appeals' belief that those amendments were passed "with almost no legislative background," Pet. App. 23a, they in fact followed several years of extensive consideration of the adverse effects that the FOIA was having on law enforcement activities. See *e.g.*, *Abramson*, 456 U.S. at 628-629 n.12.

a. In 1979, FBI Director Webster testified before Congress about law enforcement difficulties engendered by the FOIA. Pointing to the escalating use of the FOIA by prisoners and organized-crime figures as a means of identifying individuals cooperating with the FBI, he stated that the fear of disclosure under the FOIA was deterring potential sources—including "private citizens, businessmen, and officials of municipal, state, Federal and even foreign governments"—from coming forward with valuable information.[23] In the following two years,

[22] The Freedom of Information Reform Act of 1986 was enacted as §§ 1801-1804 of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-48 to 3207-51. See generally *Attorney General's Memorandum on the 1986 Amendments to the Freedom of Information Act* (1987).

[23] See *FBI Oversight: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 97, 99-100, 106 (1980). Earlier law enforcement

both the Carter and Reagan Administrations drafted legislative proposals to address these and other FOIA concerns. Those proposals incorporated a number of elements, including an amendment to Exemption 7(D) to permit withholding of information that would "tend to" identify confidential sources or release information provided by such sources.[24]

In presenting the Administration's proposal in 1981, Assistant Attorney General Rose brought to Congress's attention the very decision (*Lame*) in which the Third Circuit first announced the rule it reaffirmed in the instant case. *1981 Hearings* at 630-631. Although the court held in *Lame* that Exemption 7(D) required "detailed explanations relating to each confidential source," it expressed substantial qualms about the practical ramifications of that requirement (including deterrence of cooperation and undue burden on the FBI and the courts), and specifically commended the subject to Congress's consideration. See 654 F.2d at 929. By virtue of extensive hearings in the early 1980s,[25] Congress was thoroughly informed of the gravity of these problems, especially the unwillingness of sources to come forward with information due to fears of disclosure under the

---

reports of difficulties engendered by the FOIA are discussed in *Impact of the Freedom of Information and Privacy Acts on Law Enforcement Agencies*, GAO Rep. No. GGD-78-108 (1978).

[24] See *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 178-185, 630-633, 638-653 (1981) [*1981 Hearings*].

[25] See *1981 Hearings*, *supra*; *Freedom of Information Act: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) [*1983 Hearings*]; *Freedom of Information Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) [*1984 Hearings*].



FOIA.[26] The FBI presented a listing of more than 200 instances of source problems related to the FOIA, including specific examples of sources who were compromised as a result of FOIA disclosures or potential sources who were unwilling to cooperate fully. *1981 Hearings* at 990-1040; *1983 Hearings* at 62-93; see also *1981 Hearings* at 1041-1147 (DEA study of adverse effects of the FOIA on its enforcement efforts).

As the various witnesses pointed out, the problem was in part one of public perception that the FBI could not protect confidential sources in light of the FOIA. *1981 Hearings* at 161 (AAG Rose); *1983 Hearings* at 480-492 (Dir. Webster). The perceived dangers had foundation, moreover, in the fact that a substantial and growing percentage of FOIA requests processed by the FBI, DEA, and other law enforcement agencies were submitted by prisoners, organized-crime figures, and other known or suspected criminals. *1981 Hearings* at 161 (AAG Rose); *1983 Hearings* at 28 (AAG Rose); *id.* at 478, 491-492 (Dir. Webster); *1984 Hearings* at 812 (Dir. Webster); see *Abramson*, 456 U.S. at 628 n.12. Accordingly, as Director Webster pointed out, one of the greatest needs in any revision of the FOIA was to provide "firmer, clearly set parameters," in order "to reassure our sources that their cooperation will remain confidential." *1981 Hearings* at 854; *1984 Hearings* at 812.

Although Congress was considering a number of provisions to address these problems, a key feature at all times was an amendment to Exemption 7(D) to replace

---

[26] See *1981 Hearings* at 474-475, 481 (Secret Service Director Burke); *id.* at 487-488 (memorandum on effect of FOIA on informants); *id.* at 553-558 (report by Federal Criminal Investigators Ass'n); *id.* at 663 (AAG Rose); *id.* at 854-861, 975-980 (Dir. Webster); *1983 Hearings* at 28-29 (AAG Rose); 432-478 (reproducing 1981 memorandum on effect of FOIA on FBI); *id.* at 479-480 (Dir. Webster); *1984 Hearings* at 771-772 (DAG Dinkins); *id.* at 811-813 (Dir. Webster).

its test of whether release "would" disclose a confidential source or source information with a standard that would be easier to satisfy—initially "would tend to" disclose, and later "could reasonably be expected to" disclose, such matters. FBI Director Webster termed this "the most important section of [the] bill." *1983 Hearings* at 499; see also *1984 Hearings* at 783 (DAG Dinkins).

b. In 1984, the Senate approved a bill, S. 774, which incorporated this and other amendments to the FOIA. See 130 Cong. Rec. 3492-3521 (1984). Although the House of Representatives took no action on S. 774 in the 98th Congress, that bill and the Senate committee report recommending its passage have been recognized as the most authoritative legislative history of the 1986 amendments, which incorporated several features of S. 774 and were approved as a floor amendment and enacted into law as part of a broader crime bill in the 99th Congress. See 132 Cong. Rec. 27,189 (1986) (Sen. Leahy); *Reporters Committee*, 489 U.S. at 778 n.22; *King* v. *Department of Justice*, 830 F.2d 210, 229 n.141 (D.C. Cir. 1987).

The Senate Report concluded that difficulties in invoking Exemption 7(D) had "harmed the ability of law enforcement officers to enlist informants and carry out confidential investigations," and had "slowed the flow of confidential information to the law enforcement community." S. Rep. No. 221, 98th Cong., 1st Sess. 2 (1983). In particular, the Report discussed the relationship of the "could reasonably be expected to" language to law enforcement agencies' "burden of proof" in invoking Exemption 7(D). *Id.* at 23-24. It recognized that the burden arguably imposed by the existing "would" standard had "substantially contribut[ed] to the asserted 'perception' problem of sources doubting the FBI's ability to protect their identities from disclosure," and it explained that the "could reasonably be expected to" standard "recognizes the lack of certainty in attempting to predict harm" and provides an "objective test" for application of Exemption



7(D). *Id.* at 24; see also 132 Cong. Rec. 26,768-26,770, 31,424 (1986) (Sen. Hatch); *id.* at 27,189 (Sen. Leahy); *id.* at 27,191-27,192 (Congressional Research Service memorandum); *1986 Attorney General's Memorandum* at 9-13.

c. As this background shows, the 1986 amendments were specifically intended to "broaden the reach of [Exemption 7] and to ease considerably a Federal law enforcement agency's burden in invoking it." *Irons*, 880 F.2d at 1452; see *Reporters Committee*, 489 U.S. at 756 n.9, 777-778 n.22; 132 Cong. Rec. 31,424 (1986) (Sen. Hatch).[27] By providing that the government need only show that release of requested records "could reasonably be expected to" identify a confidential source or reveal information provided by such a source, Congress recognized the uncertainties inherent in *post hoc* assessments of law enforcement files and sought to protect sources even when the dangers are potential rather than proven with certainty. The rule we urge for Exemption 7(D) cases—which rests on a reasonable inference or presumption of confidentiality arising from the traditional practices of the FBI and the normal expectations of citizens—gives effect to the central purposes of Exemption 7(D) and the findings on which Congress acted in 1986.

---

[27] In addition to amending Exemption 7, the 1986 amendments also added special "exclusions" that provide even greater protection for certain types of records, including "informant" records when requested according to the informant's name. See Pub. L. No. 99-570, § 1802(b), 100 Stat. 3207-48 codified at 5 U.S.C. 552(c)(2). In light of the manner in which respondent's FOIA requests were made, that exclusion is not at issue here. Nonetheless, Congress's decision to provide this added protection for informants further underscores its strong commitment to respect the legitimate confidentiality needs of federal law enforcement agencies. See generally S. Rep. No. 98-221, *supra*, at 25; *1986 Attorney General's Memorandum* at 22-24.

### C. Practical Considerations Strongly Favor The Use Of Realistic Inferences In Sustaining The Application Of Exemption 7(D)

"This Court consistently has taken a practical approach when it has been confronted with an issue of interpretation of [the FOIA]." *John Doe Agency*, 493 U.S. at 157. The development of "concrete, workable standards for determining whether particular material may be withheld" under the FOIA is not only a matter of sound judicial administration; it also furthers the intent of Congress. *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); see S. Rep. No. 813, *supra*, at 3 (*Source Book* at 38) (expressing intent to provide "a workable formula which encompasses, balances, and protects all interests"). Like all statutes, moreover, FOIA must be applied in a manner "most harmonious with its scheme and with the general purposes that Congress manifested." *Abramson*, 456 U.S. at 625 n.7. In particular, the Court has recognized that while FOIA's dominant policy is disclosure, "the statutory exemptions are intended to have meaningful reach and application." *John Doe Agency*, 493 U.S. at 152. As shown by the legislative development of Exemption 7(D) described in Point B, *supra*, Congress has consistently intended that provision to be applied in a meaningful and realistic manner, in order to protect the confidential sources upon which the FBI and other law enforcement agencies depend.

In order for FOIA to serve the purposes Congress intended, the courts must apply "workable rules" not only with respect to the substantive scope of the FOIA exemptions, but also the nature of the government's burden of proof and the level of specificity at which an agency may establish the applicability of a particular exemption. See *Reporters Committee*, 489 U.S. at 777-778 n.22, 779; *Grolier*, 462 U.S. at 27-28; *Robbins Tire*, 437 U.S. at 223-224. The court below lost sight of this goal, and adopted a rule that would impose needless burdens on both law



enforcement agencies and the courts and frequently make it impossible, as a practical matter, for the FBI and other law enforcement agencies to protect legitimate confidential sources. The court's approach would prevent Exemption 7(D) from serving the purpose of reassuring potential sources that they may safely entrust information to the FBI, and could ultimately have drastic repercussions on the FBI's ability to perform its vital functions.

As the court of appeals acknowledged in *Lame*, when it first insisted upon source-specific factual showings in order for the FBI to invoke Exemption 7(D), the consequence would be to require the FBI "to expend sorely needed resources, not to deal with the burgeoning problem of crime which seriously besets all our citizens, but to devote a large number of hours of exacting labor sorting out affidavits." 654 F.2d at 929.[28] Indeed, the practical burdens that the court of appeals' rule would engender are awesome. The FBI responds to many thousands of FOIA requests each year,[29] and requests such as the present one may cover large numbers of separate sources. While the existence of such a practical burden would not be a reason to avoid

---

[28] One judge on the *Lame* panel was more direct, observing that the FBI "should be permitted to fight crime * * * rather than to serve as a librarian to furnish criminals a complete account of the evidence in the government's possession demonstrating their criminality, or to conduct historical research for the benefit of journalists seeking to spread the slime of scandal and sensationalism throughout the land for monetary gain." 654 F.2d at 932 (Dumbauld, J., concurring and dissenting).

[29] In 1983 testimony, for example, FBI Director Webster stated that the FBI had responded to more than 100,000 requests since enactment of the 1974 FOIA amendments, and processed more than one million pages of documents in 1982 alone. *1983 Hearings* at 480. The FBI continues to receive access requests at the rate of approximately 20,000 to 25,000 per year. See U.S. Dep't of Justice, *Annual Report on Freedom of Information Activities* 2, 23 (May 1, 1992); U.S. Dep't of Justice, *Annual Report on Freedom of Information Activities* 2, 24 (Apr. 25, 1991).

an obligation unequivocally imposed by Congress, we have already shown that there is no support in either the text or the legislative history of the FOIA for the insistence by the court below that the FBI justify its invocation of Exemption 7(D) by individualized factual showings, rather than by reasonable inferences regarding various categories of FBI sources. Indeed the whole thrust of Exemption 7(D) is to the contrary.

More importantly, the burden imposed by the court below extends beyond the diversion of resources. As other courts of appeals have recognized, requiring source-by-source factual showings imposes an enormous "practical difficulty—if not impossibility" for the invocation of Exemption 7(D). *Diamond*, 707 F.2d at 78; see *Donovan*, 806 F.2d at 61; *Nadler*, 955 F.2d at 1485-1486. The present case illustrates this difficulty, because the records respondent seeks are for the most part 15 years old. Even if the FBI agents who received information from sources in the investigation of the murder of Officer Snow were still available and could be located, it is highly unlikely that they would be able to swear, from memory, to the circumstances of interviews that occurred so long ago.[30] Furthermore, records of witness interviews typically provide little detail about the conduct of the interview; they merely set forth the substantive information the FBI must have to get its work done. Accordingly, an artificial requirement of "detailed explanations relating to each alleged confidential source," Pet. App. 27a, is a recipe for precluding the protection of confidential sources in many instances. Such an approach therefore fails to give "meaningful reach and application" to Exemption 7(D). *Nadler*, 955 F.2d at 1485 (quoting *John Doe Agency*, 493 U.S. at 152).

[30] In other cases, Exemption 7(D) has been applied to records far older than in the present case. See, *e.g.*, *Schmerler*, 900 F.2d at 336 (upholding application of Exemption 7(D) to records over 50 years old). In such cases, the passage of time "virtually precludes any hope of meaningful affidavits from interview participants." *Keys* v. *United States Dep't of Justice*, 830 F.2d at 345.



By ignoring the "virtues of bright-line rules," *Reporters Committee*, 489 U.S. at 780, the decision below also imposes on the federal courts the massive and unwieldy burden of evaluating the circumstances of individual law enforcement encounters to ascertain whether they connote confidentiality. See *Lame*, 654 F.2d at 929. Here again, the problem is not simply one of resource allocation, but of the effect as well on the policies that Congress sought to further. Because of the difficulties the courts would necessarily face in second-guessing the precise circumstances of long-past interviews (to the extent they could be established), the procedure envisioned by the court below would "result in *ad hoc*—and therefore unprincipled—determinations" by the courts. See *Dow Jones*, 917 F.2d at 577. Not only are such determinations likely to be of dubious reliability, but, more importantly, the unpredictability of such a decisionmaking process would leave potential sources of law enforcement information with no solid assurance that the information they confide to federal law enforcement agents will not be made publicly available under the FOIA. That is precisely the consequence that Congress sought to prevent when it passed the 1986 FOIA amendments, based on extensive testimony by federal law enforcement officials about the public perception that the FOIA was thwarting the protection of confidential sources.[31]

[31] In an analogous context, this Court expressed "serious[] doubt[s] whether a potential intelligence source will rest assured knowing that judges, who have little or no background in the delicate business of intelligence gathering, will order his identity revealed only after examining the facts of the case to determine whether the Agency actually needed to promise confidentiality in order to obtain the information." *CIA* v. *Sims*, 471 U.S. 159, 176 (1985). Whether the question concerns the circumstances justifying a promise of confidentiality in an intelligence matter or the circumstances justifying an inference of confidentiality in a criminal

The chilling effect that such uncertainty would have on potential sources of law enforcement information would attack the very heart of the protection Congress sought to provide in Exemption 7(D) and, in so doing, disrupt the flow of information upon which the FBI and other federal law enforcement agencies rely. See *Abramson*, 456 U.S. at 628 n.12; compare *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792, 803 & n.23 (1984). As the majority of the lower federal courts have recognized, a presumption of confidentiality for such sources "is necessary not only to protect the individual interviewees, but also to insure the continuing efficacy of FBI criminal investigation." *Miller*, 661 F.2d at 627; see *Hale*, 973 F.2d at 899; *Nadler*, 955 F.2d at 1486; *Keys*, 830 F.2d at 345.

### D. Reliance On A Presumption Of Confidentiality For Sources Of Information In FBI Criminal Investigations Is Consistent With The FOIA's Allocation Of The Burden Of Proof And With The Role Of Presumptions In Our Legal System

Despite the support in both the text and purposes of Exemption 7(D) for our position that confidentiality is "inherently implicit" in FBI criminal investigations, respondent argued below that any "presumption" of confidentiality is contrary to the FBI's burden under the FOIA of sustaining its withholding decisions. See Pet. App. 23a; Br. in Opp. 6-7; see also *Dow Jones*, 917 F.2d at 577-578 (Edwards, J., concurring in panel decision and dissenting from denial of rehearing en banc). The court below declined to address the FBI's reliance on Exemption 7(D) in terms of a "presumption," instead viewing the issue as "what constitutes a *prima facie* case of 'confidential source.'" Pet. App. 24a; see *id.* at 23a-25a. At bottom,

matter, "[t]here is no reason for a potential * * * source, whose welfare and safety may be at stake, to have great confidence in the ability of judges to make these judgments correctly." *Ibid.*



there is no real difference between the "prima facie case" approach that the court below considered (but rejected because of its prior ruling in *Lame*) and the "presumption" approach employed by other circuits. See *Dow Jones*, 917 F.2d at 576-577; *Nadler*, 955 F.2d at 1486. The rule the FBI seeks does not shift the ultimate burden of proof, and it therefore is in no way inconsistent with the FOIA's allocation of that burden. Moreover, like presumptions recognized in many areas of civil litigation, it reflects a realistic accommodation of probabilities and unavoidable evidentiary difficulties, and is amply justified in light of the underlying statutory policies.

1. The FOIA places upon a federal agency defending the withholding of records "the burden * * * to sustain its action." 5 U.S.C. 552(a)(4)(B). Neither the statute nor its legislative history elaborates upon this burden, and there accordingly is no reason to believe that Congress intended any higher standard than that prevalent in civil litigation in the federal courts generally—*i.e.*, proof by a preponderance of the evidence.[22] See 2 *McCormick on Evidence* § 339, at 437-441 (4th ed. 1992). As the court below recognized, the question is whether a given quantum of evidence "is enough to permit a rational inference" that it is "more likely than not" that the records at issue fall within one of the FOIA exemptions. See Pet. App. 24a;[23] compare *Leary* v.

[22] See, *e.g.*, H.R. Rep. No. 1497, *supra*, at 9 (*Source Book* at 50); S. Rep. No. 813, *supra*, at 8 (*Source Book* at 43). An earlier version of the bill expressly specified a preponderance of the evidence standard (see S. Rep. No. 1219, 88th Cong., 2d Sess. 14-17 (1964) (*Source Book* at 99-102)), but the legislative history does not suggest that omission of that phrase from the law as enacted was intended to alter the normal standard.

[23] The court of appeals' formulation, however, was only partially correct. Although the court properly invoked the "more likely than not" standard, it lost sight of the precise issue to which that evidentiary standard must be applied. The court appears to have believed that the FBI's burden is to show by a preponderance of

*United States*, 395 U.S. 6, 32-36 (1969). The rule that we urge and that most courts of appeals have adopted rests on no more than a straightforward application of this standard of proof.

Once the FBI has shown by affidavit or declaration that a particular law enforcement record identifies an outside source who provided information to the FBI during the course of a criminal investigation (or contains information provided by such a source), that fact is sufficient in itself to support a rational inference that, more likely than not, the conditions of Exemption 7(D) are met. As discussed above, both common sense and the FBI's long tradition of confidential treatment of sources—as well as the legislative record on which Congress acted in 1986—make it eminently reasonable to infer from such a showing (in the absence of any evidence to the contrary) that release of the information at issue "could reasonably be expected to" identify a source who expected confidentiality.

Where, as here, a particular inference will characteristically be well grounded in a certain class of cases, the courts have frequently found it appropriate to employ presumptions, in which proof of one fact establishes the existence of another, in the absence of evidence rebutting the presumption. The use of such presumptions is a long-established part of civil litigation, in cases arising both at common law and under federal statutes. See generally *McCormick on Evidence*, *supra*, §§ 342-343, at 449-460. Although Congress sometimes provides express presumptions, see, *e.g.*, *Leary* v. *United States*, *supra*, this Court has also recognized the propriety of their use

the evidence that the source in question is a confidential source. Under the 1986 FOIA amendments, however, the FBI need only show by a preponderance of the evidence—*i.e.*, that it is more likely than not—that disclosure of the records "could reasonably be expected to" reveal such a source or information provided by such a source.



in litigation under a variety of other federal statutory schemes that do not expressly so provide. See *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-256 (1981) (Title VII); *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245-247 (1988) (reliance on market price in "fraud on the market" securities claims); *Kungys* v. *United States*, 485 U.S. 759, 776-777 (1988) (plurality opinion) (materiality of misrepresentations in connection with naturalization proceedings).

As the discussion in the preceding sections of this brief demonstrates, the major factors that bear upon the appropriateness of a presumption—"fairness, public policy, and probability," *Basic Inc.*, 485 U.S. at 245—all point to the acceptance of the presumption of confidentiality here. See also *McCormick on Evidence* § 343, at 454-460; 1 D. Louisell & C. Mueller, *Federal Evidence* § 68, at 546-550 (1977). First and foremost, "common sense and probability," *Basic Inc.*, 485 U.S. at 245, support the proposition that persons providing information to the FBI in the course of a criminal investigation ordinarily have every reason to expect confidentiality. See pages 17-20, *supra*. Second, this is a situation in which "direct proof * * * is rendered difficult." *Ibid.* As we have explained, the passage of time and the limited documentation typically available will frequently make it "difficult[]—if not impossibl[e]" for the FBI to produce any evidence about the particular circumstances of an individual source.[*] See *Donovan*, 806 F.2d at 61. Finally, a presumption of

[*] The fact that a FOIA plaintiff may have even less ability to address the circumstances of a particular source is no reason not to employ a presumption. Since *neither* party is likely to have such information, and the probabilities so strongly favor confidentiality, use of the presumption is warranted. This result furthers the purpose of Exemption 7(D) by furthering both the reality and the perception that the FBI will be able to protect the confidentiality of sources in the absence of an affirmative showing that confidentiality was not intended in the particular instance.

confidentiality "is consistent with, and * * * supports, the congressional policy embodied in" Exemption 7(D). *Basic Inc.*, 485 U.S. at 245. For reasons already addressed, recognition of such a presumption is vital to the statutory purpose of assuring potential sources that they can confide in the FBI, and thereby to safeguard the flow of law enforcement information to the FBI.[55]

2. Recognition of such a presumption, moreover, would not improperly shift the burden of proof under the FOIA. On the contrary, the Federal Rules of Evidence eschew a burden-shifting approach to the use of presumptions in federal civil litigation. Rule 301 provides that

> a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

See generally 1 Louisell & Mueller, *supra*, § 65, at 518-525; *Burdine*, 450 U.S. at 253-256.

Recognition of a presumption of confidentiality in the present context would similarly not shift the ultimate burden of persuasion, which would remain at all times on the federal agency invoking Exemption 7(D). Moreover, "[f]ixing the burden of proof on a party is plainly not inconsistent with a substantive rule identifying specific facts that will carry the burden." *Dow Jones*, 917 F.2d at 579 (Silberman, J., concurring in denial of rehearing en banc). In an Exemption 7(D) case, the FBI fully meets its initial burden by demonstrating that release of the records in question could reasonably be expected to disclose the identity of (or information provided by) a source who furnished information to the FBI in the course of a criminal investigation. Once the FBI has made this prima facie showing, judgment must be entered in its favor unless the plaintiff comes forward with "solid evidence" that the source did not desire confidential treatment. *Dow Jones*, 917 F.2d at 577; see *Burdine*, 450 U.S. at 254.[56]

[55] A presumption also serves the goal of "judicial economy." *Basic Inc.*, 485 U.S. at 245, by avoiding a time-consuming judicial inquiry into the details of each source's cooperation with the FBI.



This approach, based upon a presumption (or inference) of confidentiality, closely parallels the "categorical" approach adopted in *Reporters Committee*, where the Court recognized that application of a clear and workable rule to a class of cases is often appropriate in order to effectuate the policies of the FOIA. 489 U.S. at 776-780 & n.22; see *Dow Jones*, 917 F.2d at 577, 579. In the present context, such a rule is essential to achieve the protection of confidential sources that Congress intended, and to preserve the flow of information upon which the FBI and other law enforcement agencies depend on a daily basis for their vital work.

[56] The courts have recognized that the substance of the information the source provided cannot serve to rebut the presumption, because the fact of a source's cooperation with the FBI will normally be a confidential matter even if the underlying facts are publicly known in some sense. See *Dow Jones*, 917 F.2d at 576; *Schmerler*, 900 F.2d at 338; *Shaw*, 749 F.2d at 61-62. Moreover, where the plaintiff presents rebuttal evidence, the normal inferences of confidentiality do not vanish. Rather, the trier of fact must take them into account, along with all of the other available evidence, in ascertaining whether the government has nevertheless met its burden of establishing the applicability of Exemption 7(D) by a preponderance of the evidence. Cf. *Burdine*, 450 U.S. at 255 n.10.

## CONCLUSION

The judgment of the court of appeals should be reversed insofar as it requires disclosure of information the FBI withheld under FOIA Exemption 7(D), and the case should be remanded with directions to enter judgment in favor of the FBI as to that information.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

STUART M. GERSON
*Assistant Attorney General*

JOHN G. ROBERTS, JR.
*Deputy Solicitor General*

EDWIN S. KNEEDLER
*Assistant to the Solicitor General*

LEONARD SCHAITMAN
JOHN F. DALY
*Attorneys*

NOVEMBER 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 342479 60095

(6)

Supreme Court, U.S.
FILED
JAN 11 1993
OFFICE OF THE CLERK

No. 91-2054

In The

# Supreme Court of the United States

October Term, 1992

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

*Petitioners,*

v.

VINCENT JAMES LANDANO,

*Respondent.*

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

## BRIEF FOR THE RESPONDENT

NEIL MULLIN
(Counsel of Record)
NANCY ERIKA SMITH
SMITH, MULLIN & KIERNAN, P.C.
200 Executive Drive
Suite 155
West Orange, New Jersey 07052
(201) 736-7033

THERESA A. AMATO
ALAN B. MORRISON
Public Citizen
Litigation Group
2000 P St., N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

ERIC R. NEISSER
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5481

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

60 pp

## QUESTIONS PRESENTED

1. Whether a practically irrebuttable presumption that any person or entity that communicates with the FBI about any matter during the course of a criminal investigation is "a confidential source" within the terms of Exemption 7D of the Freedom of Information Act, 5 U.S.C. § 552(6)(7)(d), conflicts with the plain language and legislative history of that Act.

2. In the alternative, if this Court concludes that the aforesaid presumption is not barred by the plain language or legislative history of the Freedom of Information Act, whether there is any factual or legal basis for the aforesaid presumption of confidentiality.

## PARTIES TO THE PROCEEDING

Petitioners, the defendants below, are the United States Department of Justice and the Federal Bureau of Investigation. Respondent, the plaintiff below, is Vincent James Landano.



## TABLE OF CONTENTS


Page

Opinions Below ..... 1

Jurisdiction ..... 1

Statutory Provision Involved ..... 2

Statement of the Case ..... 2

Summary of Argument ..... 7

ARGUMENT

POINT I

THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE PLAIN LANGUAGE OF THE FOIA 11

A. The Presumption Sought By The FBI Is, As A Practical Matter, Irrebuttable ..... 12

B. The Presumption Of Confidentiality Is Inconsistent With The Plain Language Of The FOIA ... 14

1. The Presumption Renders Superfluous The Term "Confidential" ..... 17

2. The FBI Premises Its Presumption Upon A Misreading Of Exemption 7(D) ..... 20

3. The Presumption Sought By The FBI Would Relieve It Of The Burden Of Proof Expressly Imposed By Congress ..... 21

POINT II

THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE LEGISLATIVE HISTORY OF THE FOIA ..... 24

TABLE OF CONTENTS – Continued

Page

A. The Legislative History Favors A Case-Specific Determination That A Person Or Entity Is "A Confidential Source" ..... 25

B. The 1974 Legislative History Expressly Disfavors The Use Of Presumptions Of The Sort Urged Here ..... 29

C. The 1974 Legislative History And The Congressional Testimony Of Law Enforcement Representatives During The Hearings Preceding The 1986 Amendments Suggest A Narrow Definition Of "A Confidential Source" ..... 33

D. The Legislative History Of The 1986 Revisions Provides No Support For The FBI's Presumption .... 37

POINT III

PRIOR DECISIONS OF THIS COURT UPHOLDING A CATEGORICAL APPROACH TO CERTAIN FOIA EXEMPTIONS DO NOT PROVIDE SUPPORT FOR THE FBI'S PRESUMPTION ..... 41

POINT IV

THE FBI'S PROPOSED PRESUMPTION LACKS A FACTUAL AND LEGAL FOUNDATION ..... 43

CONCLUSION ..... 48



TABLE OF AUTHORITIES

Page

Cases:

*Aspin* v. *Dep't of Defense*, 491 F.2d 24 (D.C. Cir. 1973) ..... 25, 26

*Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988) ..... *passim*

*Biberman* v. *Federal Bureau of Investigation*, 528 F.Supp. 1140 (S.D.N.Y. 1982) ..... 40

*Brady* v. *Maryland*, 373 U.S. 83 (1963) ..... 10, 37, 46

*Brant Constr. Co.* v. *EPA*, 778 F.2d 1258 n.8 (7th Cir. 1985) ..... 14

*Center for National Policy Review of Race and Urban Issues* v. *Weinberger*, 502 F.2d 370 (D.C. Cir. 1974) . 25, 26

*Conoco, Inc.* v. *United States Dep't of Justice*, 687 F.2d 724 (3d Cir. 1982) ..... 14

*Department of Air Force* v. *Rose*, 425 U.S. 352 (1976) ..... 10, 15, 45

*Ditlow* v. *Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974) 25, 26

*Donovan* v. *FBI*, 806 F.2d 55 (2d Cir. 1986) ..... 14

*Dow Jones & Co.* v. *Department of Justice*, 908 F.2d 1006 (D.C. Cir.), superseded, 917 F.2d 571 (D.C. Cir. 1990) ..... *passim*

*EPA* v. *Mink*, 410 U.S. 73 (1973) ..... 15, 30

*FBI* v. *Abramson*, 456 U.S. 615 (1982) ..... 15

*Ferguson* v. *FBI*, 957 F.2d 1059 (2d Cir. 1992) ..... 13

*FTC* v. *Grolier, Inc.*, 462 U.S. 19 (1983) ..... 41, 42, 43

TABLE OF AUTHORITIES – Continued

Page

*Irons* v. *FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc) ..... 14

*John Doe Agency* v. *John Doe Corporation*, 493 U.S. 146 (1989) ..... 15, 24

*Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514 (10th Cir. 1984) ..... 14, 40

*Kungys* v. *United States*, 485 U.S. 759 (1988) ..... 22, 23

*Lame* v. *United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981) (*Lame I*), appeal after remand, 767 F.2d 66 (3d Cir. 1985) (*Lame II*) ..... *passim*

*Landano* v. *Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), rev'd, 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990) ..... 3

*Landano* v. *United States Dep't of Justice*, Civ. Action No. 90-1953 (D.N.J.) ..... 3

*Landano* v. *United States Dep't of Justice*, 751 F.Supp. 502 (D.N.J. 1990) ..... 12

*Landano* v. *United States Dep't of Justice*, cert. denied, No. 92-161 (Oct. 5, 1992) ..... 7

*Malizia* v. *United States Dep't of Justice*, 519 F.Supp. 338 (S.D.N.Y. 1981) ..... 40

*Miller* v. *Bell*, 661 F.2d 623 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982) ..... 14

*Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479 n.7 (11th Cir. 1992) ..... 41

*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) ..... 41, 42, 43

*Parker* v. *Department of Justice*, 934 F.2d at 378 ... 13, 14



TABLE OF AUTHORITIES – Continued

Page

*Pennsylvania Dep't of Public Welfare* v. *Davenport*, 495 U.S. 552 (1990) ..... 17

*Pollard* v. *FBI*, 705 F.2d 1151 (9th Cir. 1983) ..... 39

*Radowich* v. *U.S. Attorney*, Dist. of Maryland, 658 F.2d 957 (4th Cir. 1981) ..... 39

*Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980) ..... 46, 47

*Schmerler* v. *FBI*, 900 F.2d 333 (D.C. Cir. 1990) ..... 13

*Sims* v. *Central Intelligence Agency*, 471 U.S. 159 (1985) ..... 19

*Terkel* v. *Kelly*, 599 F.2d 214 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) ..... 40

*Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981) ..... 21

*United States Dep't of Justice* v. *Julian*, 486 U.S. 1 (1988) ..... 14

*United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) ... *passim*

*Vaughn* v. *Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974) ..... 13

*Weisberg* v. *United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974) ..... 25, 26, 29, 30

*Wightman* v. *Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979 (1st Cir. 1985) ..... 39

*Yeager* v. *Drug Enforcement Administration*, 678 F.2d 315 (D.C. Cir. 1982) ..... 39

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

Freedom of Information Act:

5 U.S.C. § 552 ..... 2
5 U.S.C. § 552(a)(4)(B) ..... 17, 21
5 U.S.C. § 552(b)(7)(D) ..... *passim*
5 U.S.C. § 552(c)(2) ..... 18
5 U.S.C. § 552(*f*) ..... 17
7 U.S.C. § 2561 ..... 15
12 U.S.C. § 1841 ..... 15
15 U.S.C. § 1635 ..... 15
15 U.S.C. § 1667b(a) ..... 15
15 U.S.C. § 3608 ..... 15
16 U.S.C. § 773h(e) ..... 15
17 U.S.C. § 302(e) ..... 15
18 U.S.C. § 343(1) ..... 15
18 U.S.C. § 1466(b) ..... 15
18 U.S.C. § 1469 ..... 15
21 U.S.C. § 379a ..... 15
21 U.S.C. § 885 ..... 16
26 U.S.C. § 6867 ..... 16
28 U.S.C. § 1254(1) ..... 2, 16
28 U.S.C. § 2254d ..... 16



TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 464 ..... 16
30 U.S.C. § 921 ..... 16
33 U.S.C. § 920 ..... 16
35 U.S.C. § 282 ..... 16
35 U.S.C. § 295 ..... 16
38 U.S.C. § 108 ..... 16
38 U.S.C. § 1113 ..... 16
40 U.S.C. § 727 ..... 16
42 U.S.C. § 1216 ..... 16
50 U.S.C. § 403(a)(3) ..... 19
Jencks Act, 18 U.S.C. § 3500 ..... 10, 46

MISCELLANEOUS:

120 Cong. Rec. 17,017 (1974) ..... 30
120 Cong. Rec. 17,019 (1974) ..... 27
120 Cong. Rec. 17,023 (1974) ..... 31
120 Cong. Rec. 17,024 (1974) ..... 31, 32
120 Cong. Rec. 17,028 (1974) ..... 32
120 Cong. Rec. 17,029 (1974) ..... 8, 32
120 Cong. Rec. 17,032 (1974) ..... 32
120 Cong. Rec. 17,033 (1974) ..... 26
120 Cong. Rec. 17,034 (1974) ..... 26, 27
120 Cong. Rec. 17,035 (1974) ..... 27

TABLE OF AUTHORITIES – Continued

Page

120 Cong. Rec. 17,037 (1974) ..... 34

120 Cong. Rec. 17,040 (1974) ..... 34

120 Cong. Rec. 17,041 (1974) ..... 28

120 Cong. Rec. 36,871 (1974) ..... 28, 29

132 Cong. Rec. 14,039 (1986) ..... 40

132 Cong. Rec. 14,040 (1986) ..... 39

132 Cong. Rec. 14,299 (1986) ..... 38

132 Cong. Rec. 14,300 (1986) ..... 39

Fed. R. Crim. P. 16 and 26.2 ..... 46

Rule 10(b)-5 ..... 23

*Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts and Other Documents* (1975) ..... *passim*

*Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2nd Sess. (1980) ..... 35, 37, 39

*Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) ... 35, 37, 38

*Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S. 774*, 98th Cong. 1st Sess. (1983) ..... 36, 37, 39

*Freedom of Information Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Governmental Operations*, 98th Cong., 2d Sess. (1984) ..... 36, 39



TABLE OF AUTHORITIES – Continued

Page

H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974) ..... 19, 29

H.R. Rep. No. 91-1419, 92d Cong., 2d Sess. 16 (1972) ..... 27

S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965) ..... 15

Webster's Third New International Dictionary (1961) ..... 29

No. 91-2054

In The

# Supreme Court of the United States

October Term, 1992

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,

*Petitioners,*

v.

VINCENT JAMES LANDANO,

*Respondent.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Third Circuit**

## BRIEF FOR THE RESPONDENT

## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 956 F.2d 422. The opinions of the district court (Pet. App. 31a-47a, 48a-61a) are reported at 751 F. Supp. 502 and 758 F. Supp. 1021, respectively.

## JURISDICTION

The judgment of the court of appeals was entered on February 11, 1992. A petition for rehearing was denied on April 14, 1992. (Pet. App. 62a-63a). The petition for a writ of certiorari was filed on June 22, 1992, and was granted

on October 5, 1992. (J.A. 45). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Freedom of Information Act (FOIA), 5 U.S.C. § 552, provides in pertinent part:

(b) This section does not apply to matters that are –

* * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information * * * (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source * * * .

## STATEMENT OF THE CASE

Respondent, Vincent James Landano, convicted of the 1976 murder of John Snow, a New Jersey police officer, was released from prison in July of 1989 following issuance, by a federal district court, of a writ of habeas corpus. The Third Circuit Court of Appeals reversed that



ruling, finding a failure to exhaust state remedies. *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), *rev'd*, 897 F.2d 661 (3d Cir.), cert. denied, 111 S.Ct. 46 (1990). In issuing the writ, the district court found that investigators had engaged in a pattern of intentional suppression of evidence pointing to Mr. Landano's innocence and suggesting the guilt of another, Victor Forni, in the shooting of Officer Snow. *Landano v. Rafferty*, 126 F.R.D. at 646-55.

The investigation of the Snow murder was conducted by a team of local and federal investigators including the Federal Bureau of Investigation (FBI). (Pet. App. 2a). Indeed, in pretrial discovery, the prosecutor released to Mr. Landano investigative materials prepared by the FBI revealing the names and, in some cases the addresses, of 82 persons including witnesses and law enforcement personnel. (Certification of Neil Mullin dated December 21, 1990 in *Landano v. United States Dep't of Justice*, Civ. Action No. 90-1953 (D.N.J.)).

In September of 1988, the respondent filed a request with the FBI under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking information related to the Snow murder investigation. On January 10, 1989, the respondent made a second request to the FBI under the FOIA seeking files pertaining specifically to Victor Forni (J.A. 10; 15; 19 ¶¶ A and B).

On May 8, 1990, 19 months after respondent's initial request, the FBI released to him 324 pages of its 726-page file pertaining to Officer Snow. (Pet. App. 35a). On June 22, 1990, the Department of Justice informed respondent that the FBI was precluded from releasing any materials

pertaining to Victor Forni absent his express authorization to release information. (Pet. App. 35a-36a).[1]

Exhausting his administrative remedies, the respondent appealed to the Department of Justice both the FBI's decision to send him a redacted version of its Snow file and its decision not to send him its Forni file. (Pet. App. 36a). In addition to completely withholding 402 pages of the Snow file, the FBI redacted the disclosed portion severely. The FBI's submission to Mr. Landano, which included 106 pages of newspaper clippings and 38 pages of state subpoenas, provided no witness statements or FBI agents' notes concerning witness interviews. Adjacent to redacted sections, the FBI made handwritten references to Exemptions 7(C) and 7(D), in many instances citing them in tandem. (*See* J.A. 26 and Exhibit T referred to therein).

The Department of Justice affirmed the FBI's decisions with respect to the Snow and Forni files (J.A. 21, ¶ 5; 11, ¶ 15). On May 16, 1990, the respondent filed a complaint for injunctive relief under the FOIA seeking full disclosure of the Snow and Forni files. (J.A. 1).

The parties cross-moved for summary judgment. (J.A. 2). In so moving, the FBI relied upon the Declaration of Regina M. Superneau, a Special Agent of the FBI who

---

[1] Ultimately, the FBI released a redacted file of materials pertaining to Victor Forni because Forni expressly waived any right to privacy. (Pet. App. 36a). The disclosed Forni materials are not in the record below, although the parties agree that this Court's ruling on Exemption 7(D) applies to those materials. (Pet. Br. at 4 n.3).



purported to be familiar with both the procedures followed in answering Mr. Landano's FOIA request and with the documents responsive thereto. (J.A. 18-42).

The Superneau Declaration does not describe even in general terms the circumstances surrounding FBI interviews of witnesses during the Snow murder investigation. Nor does the Declaration annex or discuss any FBI policies in 1976 to 1977[2] concerning the manner of interviewing witnesses, or the manner of providing and recording promises of confidentiality to witnesses in that time period. Finally, the Declaration does not state that FBI agents identified themselves as such to witnesses during the FBI's field investigation of the Snow murder. (J.A. 18-42; *see also* Pet. App. 25a). In her Declaration, Agent Superneau indicates that the FBI considers all witnesses, even those who anticipate public trial testimony, to be confidential sources within the meaning of Exemption 7(D). (J.A. 38-39).

In two opinions, the federal district court substantially granted Mr. Landano's motion for summary judgment and substantially denied that of the FBI. (Pet. App. 31a-61a).[3] In so ruling, the district court, in pertinent part, relied upon the holding of *Lame v. United States Dep't of*

---

[2] Officer Snow was murdered on August 13, 1976; Mr. Landano was convicted on May 17, 1977. (Pet. App. 34a).

[3] The district court, however, granted the FBI's motion to withhold all FBI symbol source and file numbers, symbol numbers of confidential informants, individual rap sheet information, names of FBI informants or FBI undercover personnel, and information that could reasonably be expected to reveal the sources of confidential information. (Pet. App. 47a).

*Justice*, 654 F.2d 917, 923 (3d Cir. 1981) (*Lame I*), appeal after remand, 767 F.2d 66 (3d Cir. 1985) (*Lame II*), that "[w]hether there is an expressed or implied assurance of confidentiality is a question of fact to be determined in regard to each source." The district court found that the FBI "proffered no evidence to support its claim that persons protected by the FBI's withholding of information under Exemption 7(D) were confidential sources." (Pet. App. 53a-54a).

The FBI appealed and the Court of Appeals for the Third Circuit reversed the district court with respect to its rulings under Exemption 7(C) (Pet. App. 4a-17a), which are not at issue on this petition, but affirmed with respect to Exemption 7(D) (Pet. App. 17a-30a).

Judge Stapleton, writing for the panel, agreed that *Lame* was dispositive and required case-specific showings of confidentiality for each source. (Pet. App. 27a-28a). In so ruling, the Third Circuit rejected the FBI's argument that this Court's decision in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), undermined the authority of *Lame*. Although recognizing that this Court approved of a categorical approach to Exemption 7(C) to avoid the judicial burden of performing "case by case balancing" of FOIA-based public interests and individual privacy interests, the Circuit observed that making a factual finding about whether or not a source is confidential does not impose such a balancing burden upon the courts. (Pet. App. 29a). Moreover, while noting that providing case-specific information about alleged confidential sources might be administratively burdensome for the FBI, the Third Circuit stated: "it was for Congress, rather than this Court,



to 'attempt to accommodate the[se] concerns.' " (Pet. App. 28a, quoting *Lame*, 654 F.2d at 929).

On April 14, 1992, the Third Circuit denied the FBI's petition for rehearing in banc (Pet. App. 62a-63a). This Court granted the FBI's petition for certiorari concerning the Exemption 7(D) ruling on October 5, 1992, while denying respondent's cross-petition on the Exemption 7(C) ruling. *Landano v. United States Dep't of Justice*, cert. denied, No. 92-161 (Oct. 5, 1992).

## SUMMARY OF ARGUMENT

The Freedom of Information Act does not exempt the Federal Bureau of Investigation from its mandate for public disclosure of agency records. The presumption sought here by the FBI – that any person or entity that gives information to the FBI in a criminal investigation is "a confidential source" – would, in effect, provide such an agency-wide exemption, because (a) the primary business of the FBI is criminal investigation and (b) the FOIA permits withholding of *all* information provided by confidential sources in the course of criminal investigations. A presumption that *all* sources are confidential is at odds with the plain language and legislative history of the Act as well as the fundamental requirements for court-created presumptions.

The statute exempts information from "a confidential source," not all "sources." Clearly the two terms cannot be synonymous, if each term used by Congress is to have

meaning. Congress not only knows how to develop presumptions when needed to effectuate its statutory purposes, but has expressly used broader terms, like "persons," in other parts of FOIA, and expressly deleted the limiting adjective "confidential" from another part of Exemption 7(D). Contrary to the FBI's contention, the phrase "could reasonably be expected" describes the likelihood that "production of records" would lead to identification of confidential sources, not the likelihood that a source is confidential. The presumption sought by the FBI undermines also the burden of proof in FOIA cases expressly imposed on the government by Congress. Unlike normal presumptions, the one proposed here is virtually irrebuttable and weighs against the intended beneficiaries of the statute.

The legislative history fully supports the plain reading of the statutory language. First, in 1974, Congress expressly rejected a line of cases from the District of Columbia Circuit which, like the presumption suggested here, eliminated any agency burden to prove more than that a file was "investigatory." In its deliberations, Congress repeatedly referred to the need for case-specific determinations. Second, at the same time, Congress rejected a presumption of exemption even for sensitive, classified materials stating its intention that "when one is seeking public information . . . the matter will be heard by a judge free from any presumptions." 120 Cong. Rec. 17,029 (1974). Third, the legislative record, including repeated testimony by the FBI Director and other law enforcement personnel, confirms that "a confidential source" is a person or entity seeking to keep his, her or its identity anonymous or the information provided secret,



not every person or entity that speaks to law enforcement about a crime. Finally, the 1986 revisions, introducing the phrase "could reasonably be expected," heavily relied upon by petitioners here, expressly concerned the risk that criminal organizations could piece together a "mosaic" from even seemingly innocent information to determine a source's identity. The legislative history is clear that the FBI's alleged difficulty in proving that a particular source was promised confidentiality was *not* an issue raised by law enforcement or addressed by Congress.

This Court's ruling in *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), that categorical balancing may be appropriate in applying FOIA's Exemption 7(C), is inapplicable. The FBI's approach here is universal, not categorical. It does not seek to identify discrete categories of documents – such as code keys linking informant symbols with names – that invariably "could reasonably be expected" to disclose a confidential source's identity or information provided by that source. Rather, the FBI seeks a determination that the entire universe of persons and entities communicating with the agency in a criminal investigative setting are always "confidential source[s]" whose information is exempt. Moreover, this case does not present the judicial burden of balancing competing values and policies presented in *Reporters Committee*; a court here must merely undertake the ordinary and straightforward task of evaluating evidence to determine whether in fact a source was promised or impliedly assured of confidentiality.

In any case, the presumption sought fails to meet this Court's requirements for an evidentiary presumption, because it is unnecessary, inconsistent with the statutory policies, and factually unsupported. The evidentiary burden that Congress imposed on the agency is limited; it need show only that the source was told or impliedly promised that his or her identity would be kept confidential. Surely the FBI is capable of recording and reporting such basic information. The presumption would conflict with the "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *Department of Air Force v. Rose*, 425 U.S. 352, 360-61 (1976). Moreover, the presumption would conflict with reality. The circumstances under which sources are interviewed are too varied to provide a basis for a presumption. At times witnesses provide details of the *res gestae* that are so seemingly insignificant as not to raise any confidentiality concerns. At other times, witnesses speak unknowingly to FBI agents who have not identified themselves as such and thus such witnesses have no expectations of confidentiality. In any case, constitutional and statutory discovery requirements, such as those imposed by *Brady v. Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500, make it impossible for an FBI agent to lawfully promise every source that they will remain anonymous or that their information will remain secret.

In sum, the language, history, and purpose of the Freedom of Information Act and the ordinary prerequisites to creation of an evidentiary presumption require that this Court affirm the judgment below and direct the



FBI, like all other federal agencies, to present case-specific information proving whether a person or entity speaking to the FBI was expressly or impliedly promised confidentiality.

## ARGUMENT

### POINT I

### THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE PLAIN LANGUAGE OF THE FOIA

The court of appeals below, consistent with its prior ruling in *Lame v. United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981) (*Lame I*), appeal after remand, 767 F.2d 66 (3d Cir. 1985) (*Lame II*), held that, in order for the FBI to demonstrate that a person or entity is "a confidential source" for purposes of the FOIA Exemption 7(D), the FBI must make an evidentiary showing detailing the factual basis for its claim that a source was expressly or impliedly promised confidentiality.[4] Here, the FBI provided no such proofs, (Pet. App. 54a), despite the clear mandate of *Lame I*, but rather contended that any time any person or entity communicates about any matter with the FBI during the course of a criminal investigation, such person or

[4] In *Lame I*, the Court declared that "[w]hether there is an expressed or implied assurance of confidentiality is a question of fact to be determined in regard to each source." 654 F.2d at 923. In this case, the circuit court stated, "[w]e believe *Lame*, fairly read, contemplates a showing by the government of the particular circumstances of an interview or source." (Pet. App. 23a).

entity should as a matter of law be presumed a "confidential source." The Third Circuit properly rejected that sweeping presumption.

The presumption urged by the FBI (Pet. Br. at 12) is at odds with the plain language of the FOIA. To demonstrate why, it is necessary first to clarify the nature and scope of the presumption.

### A. The Presumption Sought By The FBI Is, As A Practical Matter, Irrebuttable

For some years, the Department of Justice has fought for judicial recognition of a presumption that *all* of the FBI's criminal investigatory sources are confidential for purposes of Exemption 7(D). In their brief, the petitioners extol "the accumulated wisdom" (Pet. Br. at 12) of circuit court decisions that embrace and define the FBI's presumption.[5]

---

[5] In its formulation of the question presented here, and throughout its brief, the FBI mutes its claim of entitlement to a nearly irrebuttable presumption, preferring, at times, to speak in terms of the proofs necessary for a "prima facie" case under Exemption 7(D). *See, e.g.*, Pet. Br. at 12. Below, however, the FBI candidly insisted that the presumption it seeks is "close to an irrebuttable one," Defendants' Memorandum In Support of Motion for Reconsideration and for Stay Pending Appeal, at 6, *Landano v. United States Dep't of Justice*, 751 F.Supp. 502 (D.N.J. 1990) (No. 90-1953) (quoting *Dow Jones & Co. v. Dep't of Justice*, 908 F.2d 1006 (D.C. Cir. 1990)). As discussed above, many of the cases relied upon here by the FBI are likewise candid in their characterization of the presumption as practically irrebuttable. However characterized, the FBI seeks to create an evidentiary rule that requires a FOIA requester to shoulder an impossible burden of rebuttal.



In *Dow Jones & Co. v. Department of Justice*, 908 F.2d 1006 (D.C. Cir.), *superseded*, 917 F.2d 571 (D.C. Cir. 1990), cited with approval throughout petitioners' brief, the court "readily admit[ted] that the presumption [of confidentiality] in practical terms comes close to an irrebuttable one." 917 F.2d at 577. The court accurately observed that a FOIA requester would "rarely, if ever, have absolutely solid evidence that the source of an FBI interview . . . has manifested complete disregard for confidentiality." *Id.* Lest there be any doubt about the strength of the presumption, the *Dow* court emphasized that "only the starkest and most conclusive evidence of non-confidentiality will rebut the presumption." *Id.*

The *Dow* court is correct that, as a practical matter, the presumption is irrebuttable. Typically a FOIA requester must litigate in the dark, not knowing either the names or addresses of persons or entities contained in FBI files, or the circumstances under which they supplied information to the FBI. *See Vaughn v. Rosen*, 484 F.2d 820, 824-25 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Thus, a FOIA requester is almost never in a position to rebut the presumed confidentiality of a source.

The FBI's ironclad presumption is not rebutted even if a FOIA requester demonstrates that at the time FBI sources were interviewed the sources knew they might have to testify about the subject of their interview in a public trial. *Schmerler v. FBI*, 900 F.2d 333, 338-39 (D.C. Cir. 1990). Nor will the fact that a source actually testified at an open trial serve as a waiver of any claim to confidentiality for purposes of escaping the reach of Exemption 7(D) according to these rulings. *Ferguson v. FBI*, 957 F.2d 1059 (2d Cir. 1992); *Parker v. Department of Justice*,

934 F.2d 375 (D.C. Cir. 1991); *Irons v. FBI*, 880 F.2d 1446 (1st Cir. 1989) (en banc); *cf., e.g., Brant Constr. Co. v. EPA*, 778 F.2d 1258, 1265 n.8 (7th Cir. 1985). Even if a district court examines FBI documents *in camera* and specifically finds "nothing in the document[s] to establish any implied confidentiality for the source[ ]," nevertheless the generic presumption of confidentiality is not overcome, and the documents may be withheld pursuant to Exemption 7(D). *Donovan v. FBI*, 806 F.2d 55, 61 (2d Cir. 1986) (quoting district court). Even in the extraordinary case where a FOIA requester supplies an affidavit from an FBI source specifying that in the course of a specific investigation the FBI gave neither express nor implied assurances of confidentiality, that affidavit has no evidential value in proving that sources other than the one named in the affidavit received no such assurances. *Miller v. Bell*, 661 F.2d 623, 627-28 (7th Cir. 1981), cert. denied, 456 U.S. 960 (1982). Indeed, according to the FBI, "a source need not have an absolute expectation of confidentiality in order to qualify as a 'confidential source' under Exemption 7(D)." (Pet. Br. at 20 n. 15).

Thus, the presumption the FBI seeks is sweeping indeed. It arises automatically: "[t]he agency need only 'state that the information was furnished by a confidential source and it is exempt.' " *Johnson v. United States Dep't of Justice*, 739 F.2d 1514, 1517 (10th Cir. 1984) (quoting *Conoco, Inc. v. United States Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982)). It is "almost irrebuttable." *Parker v. Department of Justice*, 934 F.2d at 378.

### B. The Presumption Of Confidentiality Is Inconsistent With The Plain Language Of The FOIA

This Court has "consistently stated that FOIA exemptions are to be narrowly construed." *United States Dep't of Justice v. Julian*, 486 U.S. 1, 8 (1988); *see also John Doe Agency v. John Doe Corporation*, 493 U.S. 146, 152 (1989); *FBI v. Abramson*, 456 U.S. 615, 630 (1982); *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976). This Court's policy of narrow construction is consistent with its view that the FOIA "is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 410 U.S. 73, 80 (1973).



Given the broad purpose of the Act, there is to be " 'full agency disclosure unless information is exempted under *clearly delineated statutory language.*' " *Department of Air Force v. Rose*, 425 U.S. at 360-61 (1976) (emphasis supplied) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)).

The FBI points to no "clearly delineated statutory language," *see Department of Air Force v. Rose*, 425 U.S. at 360-61, for its claim that a nearly irrebuttable presumption of confidentiality exists under the FOIA. Congress understands how to "clearly delineate" presumptions in its statutes[6], but

---

[6] *See, e.g.*, 7 U.S.C. § 2561 (presumption re plant variety); 12 U.S.C. § 1841 (presumption of non-control by a company); 15 U.S.C. § 1635 (rebuttable presumption of delivery of required credit-related disclosures); 15 U.S.C. § 1667b(a) (presumptions re consumer leases); 15 U.S.C. § 3608 (rebuttable presumption of unconscionability); 16 U.S.C. § 773h(e) (rebuttable presumption of violation of fishing laws); 17 U.S.C. § 302(e) (presumption as to the author's death); 18 U.S.C. § 343(1) (presumption of being under the influence of alcohol); 18 U.S.C. § 1466(b) (presumption that a person is engaged in pornography business); 18 U.S.C. § 1469 (rebuttable presumptions re obscenity laws); 21

nowhere in FOIA is there *any* provision calling for the FBI's presumption.

Moreover, because the presumption is virtually irrebuttable, it eviscerates the Act. Under the FBI's reasoning, *all* information provided by *any* source during a criminal investigation may be withheld from a FOIA requester, absent the rare showing of facts rebutting confidentiality. *Dow*, 917 F.2d at 577 ("[T]he FBI typically promises confidentiality and rarely – if ever – will a source not desire it. . . . "). Because the vast majority of the FBI's files consists of information gathered from sources during criminal investigations, virtually all of the FBI's files could be withheld from FOIA requesters, under the FBI's view. All that need be released, given the presumption, is material the FBI has gathered from persons or entities who are *not* FBI sources, perhaps newspaper and magazine clippings compiled only by FBI agents.

---

U.S.C. § 379a (presumption of connection with interstate commerce); 21 U.S.C. § 885 (presumption re drug offenses); 26 U.S.C. § 6867 (presumptions, for IRS purposes, re physical possession of cash); 28 U.S.C. § 2254d (presumption of correctness of state court factual findings); 29 U.S.C. § 464 (presumptions of validity or invalidity of trusteeship); 30 U.S.C. § 921 (presumption that pneumoconiosis arose out of employment as a miner); 33 U.S.C. § 920 (presumptions re claims by longshoremen for workers' compensation); 35 U.S.C. § 282 (presumption of a patent's validity); 35 U.S.C. § 295 (presumption that a product was made by a patented process); 38 U.S.C. § 108 (presumption of death based on prolonged absence); 38 U.S.C. § 1113 (presumptions re veterans' disability benefits deemed rebuttable); 40 U.S.C. § 727 (presumption of lawful conduct); 42 U.S.C. § 1216 (presumption of death or detention).



Such a presumption amounts to the near exclusion of the FBI from coverage under FOIA, an effect at odds with Congress' inclusion of the FBI in 5 U.S.C. § 552(f). Moreover, as discussed below, the presumption conflicts with the plain language of both Exemption 7(D) and 5 U.S.C. § 552(a)(4)(B).

### 1. The Presumption Renders Superfluous The Term "Confidential"

Because the presumption is, for all practical purposes, irrebuttable, it has a definitional effect; the term "a confidential source" in Exemption 7(D) is effectively *defined* to mean *all* criminal investigatory sources. Thus, the presumption renders meaningless the statutory term "confidential." This Court's "cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990). If Congress intended, as the petitioners argue, that all sources in a criminal investigation be deemed confidential sources, then Congress would not have included the adjective "confidential" in the second branch of Exemption 7(D), which specifically treats information gathered during a criminal investigation.[7]

---

[7] The pertinent portion of Exemption 7(D) provides as follows:

(b) This section does not apply to matters that are –

* * *

(7) records or information compiled for law enforcement purposes, but only to the extent that the production . . .

In contrast to Exemption 7(D), Exemption 7(B) uses the broad category "person" and 7(F) seeks to protect "any individual." While the FBI maintains that any person who supplies information during a criminal investigation is a confidential source, Congress carefully elected not to use the terms "person" or "any individual" in Exemption 7(D), but rather chose the narrower category, "confidential source."

Similarly, while the term "confidential source" expressly includes *some* "agenc[ies]," "authorit[ies]" and "institutions," it does not embrace *all* such entities. Only entities "which furnished information on a confidential basis" are deemed "confidential sources" within the terms of 7(D).

In contrast, elsewhere in the FOIA, Congress uses the term "informant," 5 U.S.C. § 552(c)(2), a narrower term than "confidential source." While many an "informant" is a "confidential source," not every "confidential source" is an "informant."[8]

---

> (D) . . . could reasonably be expected to disclose . . . in the case of a record or information compiled . . . in the course of a criminal investigation . . . *information furnished by a confidential source.*

5 U.S.C. § 552(b)(7)(D) (emphasis supplied). Had Congress intended that any criminal investigative source be automatically deemed "a confidential source," Congress would have written the emphasized phrase "information furnished by any source."

[8] In the course of drafting Exemption 7(D) in 1974, the conference committee substituted "confidential source" for "informer," to "make clear that the identity of a person other than a paid informer may be protected . . . " H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974).



To summarize, the plain language of the FOIA reveals that in framing its exemptions Congress worked with categories and subcategories, the broadest of which is the universe of all persons and entities and the narrowest of which is the set of informants. Reasonably read, the term "confidential source" falls along that continuum, embracing many paid "informants," but only a limited subset of other persons and entities, *i.e.*, those that "furnished information on a confidential basis."

The FBI's sweeping presumption ignores Congress' careful distinctions by equating "confidential source" with *all* persons and entities who have provided information during a criminal investigation, thereby rendering the adjective "confidential" superfluous. In *Sims v. Central Intelligence Agency*, 471 U.S. 159 (1985), this Court, construing the term "intelligence sources" in 50 U.S.C. § 403(a)(3), recognized that the term "a confidential source" is far narrower than a general reference to "sources." Citing Exemption 7(D) by way of contrast, this Court stated, "Congress is capable of drafting legislation that narrows the category of protected sources of information." *Sims*, 471 U.S. at 169 n.13.[9]

---

[9] Congress' intent that the adjective "confidential" retain meaning is confirmed by its 1986 amendments of Exemption 7(D). Congress deleted the adjective "confidential" before the word "information" but retained it before the word "source," in order to insure that *all* information provided by a confidential, but only a confidential, source could be withheld.

### 2. The FBI Premises Its Presumption Upon A Misreading Of Exemption 7(D)

The FBI argues that the phrase added to Exemption 7(D) in 1986 – "could reasonably be expected . . . " – provides a textual basis for its sweeping presumption. The FBI claims that this statutory language "is highly relevant" to the "pivotal issue in this case," to wit, "the nature of the FBI's *evidentiary burden*" in proving that a person or entity is a "confidential source." (Pet. Br. at 22) (emphasis in the original).

In truth, however, the phrase the FBI relies upon does not quantify the FBI's burden in proving a *source* to be "confidential." Rather, that phrase defines the FBI's burden in proving that *text* in a *document* poses a risk of exposing a confidential source's identity or information provided by that source.[10]

Exemption 7(D) simply does *not*, as the FBI imagines, exempt information provided by a source that "could reasonably be expected" to be confidential. Contrary to the FBI's claims, the "could reasonably be expected" language does not modify "confidential source." That phrase consists of a verb ("could be expected") modified by an adverb ("reasonably"), depicting what the subject of the sentence – "the production . . . of records or information"

---

[10] The FBI cites *Dow Jones*, 917 F.2d at 578 (concurring opinion), as authority for the proposition that the "could reasonably be expected . . . " clauses "refer to the confidentiality of the *source*, not the interview or the information it yields." (Pet. Br. at 15) (emphasis in original). The cited passage does not even remotely provide such authority.



– may do. As a matter of simple grammar, the verbal/adverbial phrase "could reasonably be expected" cannot function as an adjective modifying the noun phrase "a confidential source." It thus provides no support for the FBI's claim that the 1986 amendment somehow expanded the scope of "a confidential source" to include all criminal investigative sources, or lightened the burden of proving a source to be "confidential."

### 3. The Presumption Sought By The FBI Would Relieve It Of The Burden Of Proof Expressly Imposed By Congress

The FOIA places "the burden . . . on the agency to sustain its action," in withholding information pursuant to exemptions. 5 U.S.C. § 552(a)(4)(B). The FBI concedes that, pursuant to that provision, it must prove, by a preponderance of the evidence, that information is exempt from disclosure. (Pet. Br. at 39-40).

Contrary to the foregoing allocation, the FBI's nearly conclusive presumption lightens the agency's burden of proof to the point of non-existence. As Circuit Judge Edwards observed, dissenting in *Dow* from denial of rehearing *en banc*, "A burden that is presumed satisfied is, of course, no burden at all." 917 F.2d at 580.

The FBI contends here that the presumption does not eliminate the FBI's burden of proof or shift the burden to the requester, but simply defines the quantum of evidence necessary to meet the burden of proving that a source is confidential. (Pet. Br. at 42). In that regard, the FBI seeks to equate its presumption with the presumptions created by this Court in *Texas Dep't of Community*

*Affairs v. Burdine*, 450 U.S. 248 (1981), *Basic Inc. v. Levinson*, 485 U.S. 224 (1988), and *Kungys v. United States*, 485 U.S. 759 (1988).

The FBI's presumption is, in fact, distinctly different from the presumptions in those cases and unlike any presumption created by this Court because: (1) the FBI's presumption is virtually irrebuttable; and (2) the presumption weighs *against* the intended beneficiaries and the intended purpose of FOIA.

In *Burdine*, this Court found that a presumption of discrimination arises under Title VII only after a plaintiff makes a *prima facie* showing that, *e.g.*, he belongs to a protected class, is qualified for a position which was denied, and someone outside the protected class, no more qualified, received the position. In *Burdine*, however, the presumption is easily rebutted as a practical matter. The Title VII employer-defendant, need only produce evidence demonstrating a legitimate business reason for the adverse employment action to rebut the presumption. 450 U.S. at 254-55. Moreover, such a defendant, unlike the FOIA requester, typically has information (such as employee performance evaluations and corporate policy manuals) superior to that possessed by the beneficiary of the *Burdine* presumption. Also, unlike the FOIA requester, a Title VII defendant has access to liberal civil discovery to overcome the presumption of discrimination.

Finally, the *Burdine* presumption favors the intended beneficiaries of Title VII, the alleged victim of discrimination. The FBI's presumption, however, favors agencies



resisting disclosure under FOIA and thus disfavors the intended beneficiaries of this remedial Act. In sum, *Burdine* provides no authority for the FBI's presumption.

Nor does *Basic Inc.* provide any such authority. There, this Court endorsed a presumption that stock purchasers relied upon misstatements by a corporation for purposes of a Rule 10(b)-5 action. Like the *Burdine* presumption but unlike the FBI's presumption, the *Basic Inc.* presumption favors the intended beneficiaries of Rule 10(b)-5. Moreover, like the *Burdine* presumption, the *Basic Inc.* presumption is easily rebutted with any number of factual scenarios readily ascertainable through discovery. 485 U.S. at 248.

The FBI's reliance on *Kungys v. United States* is similarly misplaced. There, this Court held, in pertinent part, that proof that a naturalized citizen has made a material misrepresentation in the citizenship application process gives rise to a rebuttable presumption of ineligibility for citizenship. The *Kungys* presumption too is easily rebutted with facts easily ascertained by the person threatened with denaturalization. 485 U.S. at 777. Also, like the presumptions in *Burdine* and *Basic Inc.*, the presumption in *Kungys* is harmonious with the purpose of the statute at issue in that decision, to protect the public by preventing the naturalization of undeserving persons.

In conclusion, the FBI's presumption, practically irrebuttable and completely at odds with the FOIA's goal of

disclosure, violates the express allocation of the burden of proof by the FOIA.[11]

## POINT II

## THE PRESUMPTION SOUGHT BY THE FBI IS CONTRARY TO THE LEGISLATIVE HISTORY OF THE FOIA

The FBI has yet to identify a single page of the legislative record in which committees or members of Congress even discussed, much less approved, a presumption that all criminal investigative sources are "confidential." Indeed, the history of the FOIA militates against such a presumption.

As we detail below, the enactment of 7(D) was part of a larger revision of Exemption 7 generally, motivated by Congress' displeasure with the expansive interpretation given to it by the courts of appeals, particularly in the District of Columbia Circuit. *See John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 156 n.7 (1989). Instead, Congress

---

[11] In *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, this Court held, *inter alia*, that the burden of proof requirements of the FOIA do not, by themselves, mandate case-by-case analysis. 489 U.S. at 778-79. In *Reporters Committee*, however, this Court imposed upon the agency the substantial burden of proving that a discrete category of documents will always result in a privacy violation of greater gravity than any FOIA-based public interest that might be served by disclosure. Here, the FBI seeks to relieve itself of any real burden by obtaining a holding that the entire universe of information provided by all criminal investigative sources is automatically exempt, a result clearly at odds with the FOIA's allocation of burdens. (*See* Point III *infra*).



sought to be responsive to specific concerns of agencies like the FBI, while at the same time denying them the blanket rule that Exemption 7 was becoming. Thus, to construe the term "confidential" as the FBI does, would essentially eliminate it from the statute and re-create precisely the result that Congress sought to overturn when it amended Exemption 7 in 1974. Moreover, nothing in any of the subsequent amendments to Exemption 7 alters that basic proposition in any way. Congress simply made adjustments responding to specific problems raised by law enforcement agencies, none of which are relevant here.

### A. The Legislative History Favors A Case-Specific Determination That A Person Or Entity Is "A Confidential Source"

The series of cases[12] that the 1974 revisions of Exemption 7 repudiated, like the cases relied upon by the FBI here, reduced to insignificance the FBI's burden of proof. Senator Hart, a sponsor of the original version of the 1974 revisions of Exemption 7 perceived those cases as "a stone wall" holding that, once an agency demonstrated that documents sought were "investigatory file[s] compiled for law enforcement purposes," then "[t]he court would have the exemption applied without the

---

[12] *See Center for National Policy Review of Race and Urban Issues v. Weinberger*, 502 F.2d 370 (D.C. Cir. 1974); *Ditlow v. Brinegar*, 494 F.2d 1073 (D.C. Cir. 1974); *Aspin v. Dep't of Defense*, 491 F.2d 24 (D.C. Cir. 1973); *Weisberg v. United States Dep't of Justice*, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1974).

need of the agency to show why the disclosure of the particular document should not be made. That, we suggest, is not consistent with the intent of Congress when it passed this basic Act in 1966." 120 Cong. Rec. 17,033 (1974) (*Source Book II*[13] at 332-33). Senator Kennedy condemned the "series of recent cases in the District of Columbia" that "has applied the seventh exemption of the act woodenly and mechanically . . . " 120 Cong. Rec. 17,034 (1974) (*Source Book II* at 335).

As first presented, the revised provision exempted:

> Investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication or constitute a clearly unwarranted invasion of personal privacy, (C) disclose the identity of an informer, or (D) disclose investigative techniques and procedures.

120 Cong. Rec. 17,033 (1974) (*Source Book II* at 332). In discussing the amendment, Senator Hart, consistent with his rejection of *Weisberg*, *Aspin*, *Ditlow*, and *Center for National Policy Review*, used formulations reflecting his view that courts should conduct case-specific inquiries about the need for non-disclosure. Immediately after introducing the amendment, Senator Hart obtained unanimous consent to print in the record an excerpt of a report by a committee of the New York City Bar that stressed

---

[13] Using the same designation as the petitioners, "*Source Book II*" refers to Comm. on the Judiciary, United States Senate, *Freedom of Information Act and Amendments of 1974 (P.L. 93-502) Source Book: Legislative History, Texts and Other Documents (1975).*



"the need to preserve the identity of sources of information *in particular cases* . . . " 120 Cong. Rec. 17,034 (1974) (*Source Book II* at 334) (emphasis in the original). Senator Kennedy, too, caused that passage to be repeated in the record after his statement of support for the proposed amendment. (120 Cong. Rec. 17,035 (1974)) (*Source Book II* at 338). Elsewhere, addressing the newly revised *in camera* review provisions in the FOIA, Senator Kennedy stated that "with the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions." 120 Cong. Rec. 17,019 (1974).[14]

---

[14] Congress' view that particular circumstances be articulated by an agency seeking the benefit of Exemption 7 is consistent with the view Congress took toward another confidentiality provision that first appeared in the 1966 Act. Exemption 4 provides an exemption for matters that "are trade secrets and commercial or financial information obtained from a person and privileged *or confidential*." Following extensive oversight hearings that, in part, set the stage for the 1974 amendments to FOIA, a congressional report condemned a form, used by the Price Commission, that solicited requests for confidentiality by persons filling out a form requesting permission to increase prices. The oversight committee called for case-specific determinations of confidentiality:

> "As was stressed over and over during the hearings, the exemptions contained in subsection (b) of the act are permissive and not mandatory and *the committee knows of no agency that has specific statutory authority to extend blanket exemption, let alone to solicit the exemption of confidentiality. It is the duty of each agency to determine on an individual basis whether or not specific information fits the test of confidentiality as provided in subsection (b)(4) of the FOI Act.*

H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. 16 (1972) (*Source Book II* at 23) (emphasis supplied).

The Senate passed Senator Hart's floor amendment, 120 Cong. Rec. 17,041 (1974) (*Source Book II* at 351-52), but, thereafter, the conference committee, in response to concerns raised by President Ford, reopened discussion of Exemption 7 and other matters. President Ford did not raise any concerns about either the definition of sources deserving confidentiality or the agencies' burden in proving that a person deserves confidentiality for purpose of Exemption 7. The President's main Exemption 7 concern was to prevent release of any information provided by an informant. *See* letters between President Ford and Senator Kennedy (Aug. 20 and Sept. 23, 1974). (*Source Book II* at 368-72).

The conference committee revised Exemption 7, in pertinent part, by substituting the term "a confidential source" for "an informant" and, responding to President Ford's concern, by permitting non-disclosure of "confidential information" that was provided "only by a confidential source." 120 Cong. Rec. 36,871 (1974) (Sen. Hart) (*Source Book II* at 451). In explaining the change from "an informant" to "a confidential source," the conference committee used a formulation contemplating case-specific proofs that a source is confidential:

> The substitution of the term "confidential source" in section 552(b)(7)(D) is to make clear that the identity of a person other than a paid informer may be protected if the person provided information under an express assurance of confidentiality *or in circumstances from which such an assurance could be reasonably inferred.*



H.R. Conf. Rep. No. 93-1380, 93d Cong., 2d Sess. 12 (1974) (*Source Book II* at 230) (emphasis added).[15]

In the most extreme formulation of its position, the FBI quotes, as authority for its presumption, Senator Hart's floor statement that "all the FBI has to do is state that the information was furnished by a confidential source and it is exempt." (Pet. Br. at 28). When Senator Hart made that statement, he was not, as the FBI implies, addressing the burden of proof in showing that a person or entity is "a confidential source." Rather he was making the entirely different point, in response to President Ford's comments, that *all information* provided by a confidential source (as distinguished from only source-identifying information) would be exempt under the FOIA as revised. 120 Cong. Rec. 36,871 (1974) (Sen. Hart) (*Source Book II* at 451). Clearly, Senator Hart, who expressed strong disapproval of the *Weisberg* line of authority, did not intend by this remark to erase the *de novo* review and burden of proof provisions of the FOIA.

### B. The 1974 Legislative History Expressly Disfavors The Use Of Presumptions Of The Sort Urged Here

The District of Columbia Circuit Court decisions that prompted revision of Exemption 7 were the progeny of

---

[15] Oddly, the FBI quotes this passage as evidence supporting the presumption of confidentiality. (Pet. Br. at 28). But the emphasized language, which permits confidentiality to be "reasonably inferred" from "circumstances" clearly contemplates a source-specific analysis. The word "circumstance" means "a *specific part*, phase or attribute of the surroundings or background *of an event, fact or thing . . .* " *Webster's Third New International Dictionary* (1961) (emphasis supplied).

*EPA v. Mink*, 410 U.S. 73 (1973). *Mink* held that, once an agency states, in an affidavit, that a document has been classified as "Top Secret" or "Secret" pursuant to an executive order, a district court must inquire no further, *e.g.* through *in camera* inspection, but rather must deem the document exempt under the FOIA Exemption 1. *Id.* at 84. The *Mink* rule gave rise to the holdings of the *Weisberg* line of authority that a district court need inquire no further under Exemption 7 once an agency attests that a file is "investigatory." And the *Mink* approach is exactly parallel to the FBI's claim here that all the FBI need do is " 'state that the information was furnished by a confidential source and it is exempt.' " (Pet. Br. at 28) (quoting Senator Hart with approval).

With certain 1974 revisions, Congress emphatically rejected *Mink*[16], just as it rejected the related *Weisberg* line of authority, and, in the course of so doing, broadly condemned the use of presumptions of the type urged here by the FBI, as a device to simplify the district court's fact-finding function.

Implementing its disapproval of *Mink*, Congress passed, *inter alia*, a provision expressly permitting *in camera* inspection of classified documents in order to determine if in fact they had been properly classified. During the debate about a proposed version of the *in camera* inspection provision, Senator Muskie moved that proposed language be stricken that created a presumption in favor of the correctness of an agency's classification

---

[16] *See, e.g.*, 120 Cong. Rec. 17,017 (1974) (Sen. Kennedy).



of a document.[17] Senator Muskie observed that the presumption would "shift the burden of proof away from the Government and go against the express language [of the FOIA] . . . that in court review 'the burden of proof shall be on the Government to sustain its action.' " 120 Cong. Rec. 17,023 (1974) (*Source Book II* at 304). Arguing for his proposal, Senator Muskie added:

> *Why should [an agency head] be given a statutory presumption in addition if he cannot make his case on its merits.* He is in a better position to do that than anyone else.
>
> Then, if he cannot make a case on its merits, I say he is not entitled to a presumption.
>
> *We ought not to classify information by presumptions, but only on the basis of merit.* And only the head of an agency involved can make that case. And if he cannot make it, then he ought to lose it and not find it possible to get sustained only through the support of a statutory presumption.

---

[17] The language objected to by Senator Muskie provided as follows:

> If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order referred to in subsection (b)(1) of this section, *the court shall sustain such withholding unless,* following its in camera examination, *it finds the withholding is without a reasonable basis* under such criteria.

120 Cong. Rec. 17,023-24 (1974) (*Source Book II* at 306) (emphasis supplied).

120 Cong. Rec. 17,024 (1974) (*Source Book II* at 308-09) (emphasis supplied).[18]

Senator Ervin, speaking as a co-sponsor of the proposal by Senator Muskie, broadly rejected the use of presumptions in construing FOIA exemptions:

> *I strongly support the amendment offered* by the distinguished Senator from Maine, of which I have the privilege of being a co-sponsor, *because it makes certain that when one is seeking public information, or information which ought to be made public, the matter will be heard by a judge free from any presumptions* and free from any artificial barriers which are designed to prevent the withholding of the evidence; and I sincerely hope the Senate will adopt this amendment.

120 Cong. Rec. 17,029 (1974) (*Source Book II* at 322) (emphasis supplied).

The Senate voted overwhelmingly for the Muskie amendment. 120 Cong. Rec. 17,032 (1974) (*Source Book II* at 328), resoundingly rejecting the type of presumption urged by the FBI here.

---

[18] Senator Chiles maintained that even a rebuttable presumption in favor of agency withholding violated the *de novo* judicial review function envisioned in the Act:

> However, to raise the opinion of one person, especially an interested party, to that of a rebuttable presumption is to destroy the possibility of adequate judicial oversight which is so necessary for the Freedom of Information Act to function.

120 Cong. Rec. 17,028 (1974) (*Source Book II* at 319).



### C. The 1974 Legislative History And The Congressional Testimony Of Law Enforcement Representatives During The Hearings Preceding The 1986 Amendments Suggest A Narrow Definition Of "A Confidential Source"

As discussed in Point IV, the FBI's proposed presumption lacks a factual basis because, *inter alia*, given the constitutional and legal requirements that (1) witness names and statements be turned over to criminal defendants for use at trial, and (2) trials be open to the press and public, the FBI cannot, within the law, promise confidentiality to most of the "sources" it communicates with during a criminal investigation, (*e.g.*, witnesses). Apparently anticipating that argument (which was raised below), the FBI argues that by "a confidential source" Congress intended to include potential and actual witnesses as well as sources requiring anonymity or secrecy. (*See* Pet. Br. at 20 n.15 and J.A. 37-38, Superneau Decl. ¶ 49).

The FBI presents no legislative history to support its definition. In fact, the legislative history demonstrates that the law enforcement community as well as Congress concerned themselves with sources that desired complete anonymity and secrecy, not sources that anticipated public exposure through pre-trial discovery and trial testimony.

Thus, in a "Memorandum Letter" Senator Hart authored and placed in the record in 1974, he used the terms "confidentiality" and "anonymity" interchangeably:

> A question has been raised as to whether my amendment might hinder the Federal Bureau of Investigation in the performance of its investigatory duties. The Bureau stresses the need for confidentiality in its investigations. I agree completely. All of us recognize the crucial law enforcement role of the Bureau's unparalleled investigating capabilities.
>
> • • •
>
> *If informants' anonymity – whether paid informers or citizen volunteers – would be threatened, there would be no disclosures.*

120 Cong. Rec. 17,040 (1974) (*Source Book II* at 351) (emphasis supplied).[19]

Indeed, the FBI itself quotes a formulation by Senator Thurmond equating the need for confidence with the need for secrecy: "The FBI has always staked its high reputation on the fact that information given to it in confidence *is kept secret*." 120 Cong. Rec. 17,037 (1974) (*Source Book II* at 343) (quoted in Pet. Br. at 27) (emphasis supplied).

Testifying before Congress, FBI Director Webster did *not* call upon that body to protect witnesses interviewed during routine field operations of the FBI following commission of a crime, but rather expressed concern for the well-being of paid and unpaid tipsters who required

---

[19] Elsewhere, Senator Hart stated that the amendments were intended to protect "paid informers or simply concerned citizens who give information to enforcement agencies and desire their identity to be kept confidential." 120 Cong. Rec. 17,034 (1974) (*Source Book II* at 334).



complete anonymity. See *e.g.* Statement of William H. Webster, FBI Director, in *Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2nd Sess. (1980) [hereinafter *1980 Hearings*] at 425-507. There, Director Webster spoke of informants' general concern that their identity not be exposed to anyone beyond law enforcement operatives: "We have found that there are those in many segments of society who are refusing to provide us information because they fear their identity may be disclosed under the law." *Id.* at 460. The Director provided numerous detailed examples of "current" or "potential informants" who feared *any* exposure of their identity. *Id.* at 494-507. The Director used the term "confidential source" interchangeably with the notion of paid and unpaid informants' desiring total anonymity. *See, e.g., id.* at 500, ¶¶ 4 and 5.

At the 1980 hearings, Robert Nesoff, National Liaison of the Federal Criminal Investigator's Association, stated that because of the FOIA many agencies found it "impossible . . . to maintain a network of confidential informants . . . [U]nder FOIA many of these informants have become panic stricken about their identities being revealed." *1980 Hearings* at 230.

During the 1981 hearings before Congress, CIA Director William J. Casey argued that FOIA undermined CIA assurances of *secrecy* to sources. *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) [*1981 Hearings*] at 592. "We must be able to provide human sources with absolute assurance that the fact of their cooperation with the United States will forever be

kept secret and that the information they provide will never be revealed or attributed to them," the Director stated. *Id.*

In his 1981 testimony before Congress, FBI Director Webster again provided a list of paid and unpaid sources who feared *any* disclosure of their identities, especially to criminal defendants.[20] *See 1981 Hearings* at 990-1040. *See also id.* at 1042-79 (detailing the impact of FOIA on DEA sources). Throughout his 1981 testimony, Director Webster expressed a concern that paid and unpaid informants' identities might be exposed to anyone beyond the FBI. *See, e.g., id.* at 855-65. Likewise, in his 1983 and 1984 testimony before Congress, FBI Director Webster was concerned with protecting sources that required total anonymity. *See Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S. 774*, 98th Cong. 1st Sess. (1983) [*1983 Hearings*] at 431-82; *see also id.* at 62-93; *Freedom of Information Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) [*1984 Hearings*] at 810-26.

---

[20] Director Webster's listing also detailed the concerns of local law enforcement entities that (1) their status as FBI sources be kept secret, *see e.g. 1981 Hearings* at 991 ¶ 6; (2) their locally prepared reports be kept secret, *id.* at 990 ¶ 6; (3) their local sources be kept anonymous, *id.* at 990 ¶ 4; and (4) the subjects of their local investigations be kept secret, *id.* at 990 ¶ 6. Director Webster's listing revealed that private entities feared, in many instances, that their exposure as FBI sources would subject them to civil liability from third parties who felt that their right to privacy had been violated. *Id.* at 993 ¶ 5, 994 ¶ 7, 995 ¶ 3 and 998 ¶ 3.



In the 1983 hearings, Senator Hatch equated the law enforcement community's interest in confidentiality with the media's interest in maintaining the absolute anonymity of its sources. Assistant Attorney General Rose stated, "I share your view exactly." *1983 Hearings* at 33, ¶¶ 6-7.

Thus, in the parlance of the congressional deliberations, the term "confidential source" meant a paid or unpaid person or entity desiring anonymity, or secrecy of information, not a source reasonably expecting exposure of identity or information in pre-trial proceedings or trial.[21]

### D. The Legislative History Of The 1986 Revisions Provides No Support For The FBI's Presumption

The FBI cites nothing from the congressional record indicating that, either in hearings leading up to the 1986

---

[21] The court below erroneously, and without reference to legislative history, opined that Congress must have intended "confidential source" to mean one whose identity would not be disclosed "unless such disclosure is determined by the FBI to be important to the success of its law enforcement objective." (Pet. App. 25a). The circuit court concluded that given the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Federal Rules of Criminal Procedure, FBI assurances of complete anonymity "must be exceedingly rare, if they exist at all." (Pet. App. 24a). The *1980, 1981, 1983,* and *1984 Hearings* however reveal hundreds of instances in which unpaid citizens function not as witnesses, whose names and statements must be turned over to defendants, but as reliable tipsters or inside sources who require anonymity or secrecy. It is that category of persons that Congress intended to embrace with the term "a confidential source."

FOIA amendments or in floor discussions, Congress even considered an agency's burden of proof in demonstrating a source to be "confidential," the issue that lies at the heart of this case. As the FBI points out (Pet. Br. at 32), in the 1981 hearings, Assistant Attorney General Jonathan Rose brought to Congress' attention *Lame v. United States Dep't of Justice*, 654 F.2d 917 (3d Cir. 1981), the precedent that was dispositive below. Rose, however, quoted only a passage from *Lame* with which he agreed, opining about the administrative and judicial burdens generally imposed by the FOIA. Rose did not quote from, or comment upon, the holding of *Lame* that an agency must offer case-specific proof that a source is "confidential." *See 1981 Hearings* at 630-31.

Most important, Congress did not purport to overrule *Lame* with its 1986 amendments. A Congressional Research Service ("CRS") analysis of the 1986 amendments to Exemption 7, placed into the Congressional Record by Senator Leahy, a co-drafter and co-sponsor of the 1986 amendments to Exemption 7, referring to the proposed substitution of "could reasonably be expected to" for "would," states in pertinent part:

> The proposed amendment does not appear to be prompted by any particular case or line of cases that have enunciated a contrary standard of the degree of risk of harm that must be shown to justify assertion of Exemption 7(A), (D) or (F).

132 Cong. Rec. 14,299 (1986).

Far from addressing the *Lame* holding, the 1986 amendments were aimed at adopting the holding of a line of cases, unrelated to *Lame*, that an agency need show



only a reasonable tendency, rather than certainty, that text in a withheld document might cause a harm sought to be prevented by Exemption 7. *See Wightman v. Bureau of Alcohol, Tobacco & Firearms*, 755 F.2d 979, 982 (1st Cir. 1985); *Pollard v. FBI*, 705 F.2d 1151, 1155 (9th Cir. 1983); *Yeager v. Drug Enforcement Administration*, 678 F.2d 315, 323 (D.C. Cir. 1982); and *Radowich v. U.S. Attorney, Dist. of Maryland*, 658 F.2d 957, 961 (4th Cir. 1981) (all cited with approval in the CRS analysis, *supra*, 132 Cong. Rec. 14,300 (1986)).

In adopting the holding of those cases, Congress responded to concerns expressed by the intelligence and law enforcement community at hearings in 1980, 1981, 1983, and 1984,[22] that: (1) criminal organizations with institutional memories might be able to piece together a "mosaic" of information from various FOIA disclosures enabling them to identify confidential sources[23]; and (2)

---

[22] *See 1980 Hearings* at 459 (FBI Director Webster); *1981 Hearings* at 587-95 (prepared Statement of CIA Director Casey) and at 487-91, 847-65, 973-89 (statement and testimony of FBI Director Webster); *1983 Hearings* at 29, 43, 59 (AAG Rose); 479-80 (Director Webster); *1984 Hearings* at 783 (DAG Dinkins) and at 811-13 (Director Webster).

[23] Explaining the 1986 amendments, Senator Hatch explained:

> Because of the *mosaic problem* with FOIA and the particular threat posed by organizations with historical continuity and an institutional memory and further because *use of the exemptions themselves can become a "piece of the mosaic,"* simply broadening existing exemptions will not cure the problem of organized crime abuse of FOIA.

132 Cong. Rec. 14,040 (1986) (emphasis supplied).

agency employees processing documents under the FOIA have no way of knowing whether facially neutral facts contained in documents might have special meaning to criminals enabling them to construct such a source-identifying "mosaic."[24]

Throughout the hearings law enforcement witnesses testified about the foregoing "mosaic" problem and its attendant chilling effect on potential sources. The FBI has not pointed to a single instance, and respondent has not found one, of the law enforcement community complaining to Congress in the pre-1986 hearings of the difficulty of proving that a source is "confidential." The 1986 amendments simply did not address the issue before this Court.

Had Congress intended to expand the definition of "a confidential source" to include, as the FBI seeks here, all criminal investigative sources, it would have done so expressly. Thus, in 1986, Congress, in accord with various decisions[25] expressly expanded the meaning of "a confidential source" to "includ[e] a State, local, or foreign

---

[24] Criticizing the 1974 language, Senator Hatch stated:

> The problem with the narrow "would disclose" language is that there is no way for the DEA to know what the criminal requester knows. The criminal may know that one of his friends always calls a party a "bash" or a soft drink a "pop." If one of those words appear in a requested record, he has identified the informant.

132 Cong. Rec. 14,039 (1986).

[25] *See Johnson v. Department of Justice*, 739 F.2d 1514 (10th Cir. 1984); *Terkel v. Kelly*, 599 F.2d 214, 216 (7th Cir. 1979), cert. denied, 444 U.S. 1013 (1980); *Biberman v. Federal Bureau of Investigation*, 528 F.Supp. 1140 (S.D.N.Y. 1982); *Malizia v. United States Dep't of Justice*, 519 F.Supp. 338, 350 (S.D.N.Y. 1981).



agency or authority or any private institution which furnished information on a confidential basis . . . " 5 U.S.C. § 552(b)(7)(D).

In sum, nothing in the legislative history of the 1986 amendments supports the FBI's claim that Congress intended by those amendments to permit a nearly irrebuttable presumption that all criminal investigative sources are "confidential source[s]" under the Act.

## POINT III

## PRIOR DECISIONS OF THIS COURT UPHOLDING A CATEGORICAL APPROACH TO CERTAIN FOIA EXEMPTIONS DO NOT PROVIDE SUPPORT FOR THE FBI'S PRESUMPTION

The FBI contends that this Court's approval of a categorical approach to Exemption 7(C), *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989); Exemption 7(A), *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); and Exemption 5, *FTC v. Grolier, Inc.*, 462 U.S. 19 (1983), justifies the nearly irrebuttable presumption of confidentiality urged here. (Pet. Br. at 24-25). *See also Nadler v. United States Dep't of Justice*, 955 F.2d 1479, 1486 n.7 (11th Cir. 1992); *Dow Jones*, 917 F.2d at 577.

In fact, this Court's categorical approach in other cases is not dispositive here. First, the approach urged here is not categorical; it is universal. Under the unique structure of Exemption 7(D), once a source is deemed

"confidential" then *all* the information provided by that source in the course of a criminal or lawful national security intelligence investigation is deemed exempt. Thus, by defining "a confidential source" to be everyone who communicates with the FBI in the course of such investigation, the FBI would exempt the entire universe of investigative records and information. Such an approach is far different from the categorical exemption of well-defined types of documents in *Reporters Committee* (rap sheets), *Robbins* (NLRB witness statements), and *Grolier* (attorney work product documents). In *FTC v. Grolier*, this Court approved the "establish[ment] [of] a *discrete* category of exempt information . . . " 462 U.S. at 27 (emphasis supplied), quoted with approval in *Reporters Committee*, 489 U.S. at 779.

Second, the language of Exemption 7(C) relied upon in *Reporters Committee* to justify a categorical approach ("could reasonably be expected"), *see id.* at 777 n.22, while reappearing in Exemption 7(D), does not bear upon or relate to any agency's burden in proving a source "confidential." Rather it defines, as in Exemption 7(C), the degree of risk that an agency must demonstrate in proving that text in a particular document might expose the identity of a confidential source or information provided by that source. Thus, while arguably the language "could reasonably be expected" in Exemption 7(D) might allow a categorical determination that specific types of *documents* will always reveal the identity of a confidential source, *e.g.*, a document that keys informants' code numbers to their actual names and addresses, that statutory phrase does not permit a determination that an entire universe of *persons and entities* are always "confidential source[s]."



Third, in adopting a categorical approach to Exemption 7(C), this Court sought to avoid the adjudicative difficulties attendant upon the difficult balancing of FOIA-based public interests against various privacy interests. *Id.* at 778-80. As the Third Circuit noted (Pet. App. 29a), under Exemption 7(D), however, the courts are not called upon to engage in any complex balancing of competing values. Rather they are called upon to make only a straightforward factual determination whether an investigative source was expressly or impliedly assured confidentiality. While there may be some administrative burden for the FBI in demonstrating that a source is "confidential," it is, as the Third Circuit noted (Pet. App. 28a) for Congress, not the courts, to relieve that burden by redefining the term "confidential" or by clearly delineating the FBI's proposed presumption.

In sum, neither *Reporters Committee*, *Robbins*, nor *Grolier* provides any authority for the FBI's presumption.

## POINT IV

## THE FBI'S PROPOSED PRESUMPTION LACKS A FACTUAL AND LEGAL FOUNDATION

Were this Court to conclude that neither the plain language of the FOIA nor its legislative history precludes a presumption of the type urged here, nevertheless, the presumption should be rejected because it lacks a sufficient factual and legal footing.

First, there is simply no evidence that a presumption is necessary. "Presumptions typically serve to assist courts in managing circumstances in which direct proof,

for one reason or another, is rendered difficult." *Basic Inc. v. Levinson*, 485 U.S. at 245.

There is undocumented speculation in petitioners' brief that "it is highly unlikely that [FBI agents involved in this case] would be able to swear, from memory, to the circumstances of interviews that occurred so long ago." (Pet. Br. at 36). And there is the completely unsubstantiated claim that "records of witness interviews typically provide little detail about the conduct of the interview . . . " (*Id.*) But the FBI points to no evidence setting forth: (1) whether or not the FBI requires agents to record promises of, or requests for, confidentiality; (2) whether or not the FBI requires agents to record, on specific forms, the time, place and manner of witness interviews; (3) whether or not the FBI requires its agents to promise confidentiality to certain categories of targets, suspects, or witnesses; and (4) whether, and under what circumstances the FBI identifies itself to persons it interviews. In short, it may well be that typical FBI records of witness interviews provide ample, easily accessible evidence of the circumstances surrounding source interviews, notwithstanding the FBI's speculation. Indeed, in *Lame*, the decision complained of by the FBI, the agency, on remand, thoroughly satisfied the case-specific proof demanded by the Third Circuit. *Lame v. United States Dep't of Justice*, 767 F.2d 66 (3d Cir. 1985). Moreover, as discussed above, when appearing before Congress, the FBI was able to detail hundreds of instances wherein sources discussed their concerns and fears about confidentiality, providing further evidence that the FBI records the circumstances of source interviews. Having failed to



provide any evidence demonstrating the need for a presumption, the FBI should not be rewarded with the sweeping rule it seeks.

Second, a presumption must be "consistent with" and "support[ ] the congressional policy embodied" in the relevant Act of Congress. *Basic Inc.*, 485 U.S. at 245. The basic policy of the FOIA is to implement " 'a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language.' " *Department of Air Force v. Rose*, 425 U.S. at 360-61 (1976) (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)). As discussed at length above, the presumption militates against disclosure and effectively creates an exemption that is not clearly delineated for all criminal investigative sources.

Third, a presumption must be "supported by common sense and probability." *Basic Inc.*, 485 U.S. at 246. There is simply no evidence that all or even most persons or entities who communicate with the FBI about anything during a criminal investigation do so with an expectation of confidentiality or that the FBI must assure such confidentiality in order to conduct its investigative work.

In truth, contrary to the FBI's claim that in the "setting" of criminal investigative communications "confidentiality is inherent" (Pet. Br. at 8), there are numerous inter-dependent variables that create a broad spectrum of possibilities concerning confidentiality.

Thus, for example, there is no evidence that the FBI regularly identifies itself during field interviews of witnesses following commission of a crime, notwithstanding the FBI's reference to a 1978 FBI manual that is not in the

record and that the FBI does not claim is publicly available. (Pet. Br. at 20 n.14).[26] Obviously, if a witness is unknowingly speaking to an undercover FBI agent, he/she will have no expectation that the FBI will maintain confidentiality.

Moreover, while anonymous tipsters and paid informants inferrably will almost always want confidentiality, and therefore may be presumed confidential, it is not at all probable that most citizen volunteers who witness some discrete aspect of a crime, *e.g.*, the color of a car or the hair texture of a person, will expect or need confidentiality. In many "setting[s]" to use the FBI's term, witnesses speaking to the FBI do not even know they have witnessed a crime and thus have no reason to expect confidentiality when answering simple factual questions. Even when bystanders know they have witnessed a crime and that they are speaking to the FBI, they may have no reason to fear identification by perpetrators, especially if they are simply offering their observation of a discrete, seemingly unimportant, aspect of the *res gestae*.

Also, given the disclosure requirements of the Jencks Act, 18 U.S.C. § 3500, *Brady v. Maryland*, 373 U.S. 83 (1963), and federal discovery rules, Fed. R. Crim. P. 16 and 26.2, and given the fact that most court proceedings are open to the press and public, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980),[27] it is clear that an FBI

---

[26] See respondent's Motion for Supplementation of the Record.

[27] The FBI suggests that trial proceedings have "attendant judicial restraints and protections" (J.A. 38) that might serve to protect "confidential sources" who publicly testify. But trials are



agent can only rarely make an honest and lawful promise of confidentiality to a source.

Thus, there exists no "inherent" confidentiality because there is no invariable "setting" for criminal investigative interviews; the FBI is not entitled to a presumption far removed from the factual reality of its activities.

As mentioned in Point II, *supra*, in order to justify its presumption, the FBI suggests that "confidential" for purposes of Exemption 7(D) means something considerably broader than anonymous or secret and embraces even sources that fully anticipate public testimony at trial. (Pet. Br. at 20 n.15). But, as detailed in Point II, the law enforcement concerns that Congress addressed with its 1974 and 1986 revisions of Exemption 7, focussed on the need to assure anonymity of sources and secrecy for certain information provided by sources. It is simply not "probable", *see Basic Inc.*, 485 U.S. at 246, either that anyone who speaks to the FBI about anything during a criminal investigation expects anonymity or that any entity that communicates with the FBI expects that the information it supplies will be kept secret.

Given the failure of the FBI to demonstrate the necessity for a presumption, given its dissonance with the

---

public, *Richmond Newspaper*, and the press widely reports legal proceedings. The names of source-witnesses in the underlying criminal case here now appear in thousands of law books throughout the nation.

basic goal of the FOIA and given the absence of a factual basis for the presumption, this Court should reject it.[28]

## CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals for the Third Circuit with regard to FOIA Exemption 7(D) should be affirmed.

Respectfully submitted,

NEIL MULLIN
(Counsel of Record)
NANCY ERIKA SMITH
SMITH, MULLIN & KIERNAN, P.C.
200 Executive Drive
Suite 155
West Orange, New Jersey 07052
(201) 736-7033

THERESA A. AMATO
ALAN B. MORRISON
Public Citizen
Litigation Group
2000 P St., N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

ERIC R. NEISSER
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5481

January 11, 1993

---

[28] Even were this Court to adopt the FBI's presumption, the judgment below should be affirmed because, as the Third Circuit has noted, the FBI has failed to offer any evidence that the sources in this case knew they were communicating with FBI agents. (Pet. App. 25a). Obviously, unwitting sources cannot expect to receive confidentiality from the FBI. *See also* respondent's Motion for Supplementation of the Record.

Supreme Court, U.S.
FILED
FEB 11 1993
OFFICE OF THE CLERK

No. 91-2054

# In the Supreme Court of the United States

OCTOBER TERM, 1992

---

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

VINCENT JAMES LANDANO

---

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## REPLY BRIEF FOR THE PETITIONERS

---

WILLIAM C. BRYSON
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## TABLE OF AUTHORITIES

Cases: Page


*Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988) ..... 12
*Brady* v. *Maryland*, 373 U.S. 83 (1963) ..... 4
*Brant Constr. Co.* v. *EPA*, 778 F.2d 1258 (7th Cir. 1985) ..... 17
*Critical Mass Energy Project* v. *NRC*, 975 F.2d 871 (D.C. Cir. 1992), petition for cert. pending, No. 92-1043 ..... 11
*Diamond* v. *FBI*, 707 F.2d 75 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984) ..... 14
*Donovan* v. *FBI*, 806 F.2d 55 (2d Cir. 1986) ..... 18
*Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571 (D.C. Cir. 1990) ..... 2, 8, 11, 13
*EPA* v. *Mink*, 410 U.S. 73 (1973) ..... 16, 18
*FBI* v. *Abramson*, 456 U.S. 615 (1982) ..... 9, 12
*FTC* v. *Grolier Inc.*, 462 U.S. 19 (1983) ..... 8
*Hale* v. *United States Dep't of Justice*, 973 F.2d 894 (10th Cir. 1992) ..... 12
*Irons* v. *FBI*, 811 F.2d 681 (1st Cir. 1987) ..... 19
*Irons* v. *FBI*, 880 F.2d 1446 (1st Cir. 1989) ..... 3, 7
*John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146 (1989) ..... 11
*Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514 (10th Cir. 1984) ..... 13
*Krikorian* v. *Department of State*, No. 91-5028 (D.C. Cir. Jan. 29, 1993) ..... 10
*Lame* v. *United States Dep't of Justice*, 767 F.2d 66 (3d Cir. 1985) ..... 15
*Londrigan* v. *FBI*, 722 F.2d 840 (D.C. Cir. 1983) ..... 13
*Meeropol* v. *Meese*, 790 F.2d 942 (D.C. Cir. 1986) ..... 18
*Military Audit Project* v. *Casey*, 656 F.2d 724 (D.C. Cir. 1981) ..... 10
*Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479 (11th Cir. 1992) ..... 13, 16
*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) ..... 8, 9
*Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633 (1990) ..... 7

Cases—Continued: Page

*Providence Journal Co.* v. *United States Dep't of the Army*, No. 92-1166 (1st Cir. Dec. 8, 1992) .... 3
*Rosenfeld* v. *United States*, 859 F.2d 717 (9th Cir. 1988) .... 19
*Schmerler* v. *FBI*, 900 F.2d 333 (D.C. Cir. 1987) .... 16
*Shaw* v. *FBI*, 749 F.2d 58 (D.C. Cir. 1984) .... 14
*Silets* v. *United States Dep't of Justice*, 945 F.2d 227 (7th Cir. 1991), cert. denied, 112 S. Ct. 2991 (1992) .... 18
*Summers* v. *United States Dep't of Justice*, 925 F.2d 450 (D.C. Cir. 1991) .... 19
*United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989) .... 7, 8, 10, 17
*United States* v. *Weber Aircraft Corp.*, 465 U.S. 792 (1984) .... 12
*Weisberg* v. *United States Dep't of Justice*, 848 F.2d 1265 (D.C. Cir. 1988) .... 18-19
*Weisberg* v. *Webster*, 749 F.2d 864 (D.C. Cir. 1984) .... 18

Statutes:

Freedom of Information Act, 5 U.S.C. 552:
5 U.S.C. 552(a) (4) (A) (iii) .... 18
5 U.S.C. 552(b) (1) .... 10
5 U.S.C. 552(b) (4) .... 10
5 U.S.C. 552(b) (7) (D) .... *passim*
Privacy Act, 5 U.S.C. 552a:
5 U.S.C. 552a(j) (2) .... 16
5 U.S.C. 552a(k) (5) .... 16

Miscellaneous:

120 Cong. Rec. (1974):
p. 17,019 .... 9
p. 17,035 .... 9
Frank Donner, *Keeping Very Close Tabs on America's Writers*, N.Y. Times, Mar. 16, 1992 (review of N. Robins, *Alien Ink: The FBI's War on Freedom of Expression* (1992)) .... 19



Miscellaneous—Continued: Page

*Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981) .... 4
*Freedom of Information Reform Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. (1984) .... 4
*Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. (1983) .... 4
H.R. Conf. Rep. No. 1380, 93d Cong., 2d Sess. (1974) .... 9-10, 15
Herbert Mitgang, *Investigating the Chief Investigator*, N.Y. Times, Oct. 16, 1991 (review of C. Gentry, *J. Edgar Hoover: The Man and the Secrets* (1991), and A. Theoharis, ed., *From the Secret Files of J. Edgar Hoover* (1991)) .... 19
Herbert Mitgang, *When Academics Doubled as Intelligence Agents*, N.Y. Times, July 29, 1992 (reviewing S. Diamond, *Compromised Campus: The Collaboration of Universities with the Intelligence Community, 1945-1955* (1992)) .... 19
2 *McCormick on Evidence* (4th ed. 1992) .... 11
*Oversight of the Administration of the Federal Freedom of Information Act: Hearings before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. (1980) .... 4
S. Rep. No. 1200, 93d Cong., 2d Sess. (1974) .... 5, 10
S. Rep. No. 221, 98th Cong., 1st Sess. (1983) .... 7

# In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2054

UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,
PETITIONERS

*v.*

VINCENT JAMES LANDANO

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

Respondent fails in his efforts to defend the court of appeals' holding that "detailed explanations relating to each alleged confidential source" are a prerequisite to any invocation of Exemption 7(D) of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(7)(D). Pet. App. 27a. Respondent points to no provision of the FOIA that imposes such a requirement, nor any indication that Congress envisioned such particularized showings. In fact, the language of Exemption 7(D) (especially as amended in 1986), the background and policies of that Exemption, and this Court's past approval of categorical showings under the FOIA all demonstrate that in a case such as this, individualized proofs are unnecessary. Despite respondent's rhetoric about "evisceration" of the FOIA under this approach, the FOIA has for many years continued to serve its function of informing the public

even as federal law enforcement agencies and most federal courts have adhered to a presumption of source confidentiality in criminal investigations. By contrast, adoption of respondent's view would drastically alter the application of Exemption 7(D)—frequently making it impossible to invoke its protection, subjecting a wide range of sources to exposure, and jeopardizing the flow of vital source information to the FBI and other federal law enforcement agencies.

A.1. Respondent first tries to avoid the inference of confidentiality for the FBI's sources in this case by redefining the statutory term "confidential," imposing on it a highly restrictive meaning that has no basis in the text of the FOIA and that would render Exemption 7(D) ineffective to protect FBI sources. Specifically, respondent asserts (Br. 33, 46-47) that only "sources that desired complete anonymity and secrecy" can qualify as "confidential" under Exemption 7(D), and that assurances of confidentiality therefore can only "rarely" be given. The court of appeals correctly rejected that rigid view and properly understood the term "confidential" to embrace various degrees of confidentiality. Pet. App. 24a-25a. Sources cannot expect *total* confidentiality (in the sense of no dissemination of the information beyond the agent to whom it is given), for then the FBI itself would be unable to make use of the information. See *Dow Jones & Co.* v. *Department of Justice*, 917 F.2d 571, 579 (D.C. Cir. 1990) (Silberman, J., concurring in denial of rehearing en banc); Gov't Br. 20 n.15.

Respondent's contrary argument ignores the ordinary meaning of "confidential," which contains no such stringent limitation (see Gov't Br. 15-16), and it is wholly without support in the legislative history. That history shows that Congress was fully aware that confidentiality is the norm when the FBI obtains information from sources in a criminal investigation, and that Congress intended to protect a wide range of such sources, including "citizen volunteers" as well as "informants." See Gov't Br. 26-27, 29. The fact that some members of Congress referred to "anonymity" or "secrecy" (see Resp. Br. 33-34) proves nothing, for those terms are inherently no more absolute than "confidentiality." The FBI can maintain the "secrecy" of some aspects of a source's cooperation while revealing others, or maintain the "anonymity" of a source as regards the public at large while revealing his identity selectively, as necessary for law enforcement purposes.



Furthermore, as the First Circuit recognized in *Irons* v. *FBI*, 880 F.2d 1446, 1449-1452 (1989) (en banc), the legislative history of the 1974 FOIA amendments affirmatively supports protection for sources even when their confidentiality may be less than absolute. In rejecting the notion that subsequent testimony "waives" confidentiality under Exemption 7(D), the *Irons* court recognized that the 1974 amendments were the product of substantial give and take, and that their passage hinged on the term "confidential source," which was understood to be comprehensive in scope. Thus, "Congress intended a literal interpretation [of Exemption 7(D)], even where a literal application sweeps broadly." 880 F.2d at 1449.[1]

Respondent also errs in suggesting (Br. 34-37) that the government officials (such as then-FBI Director Webster) who urged a further revision of Exemption 7(D) in the 1980s were concerned only with the confidentiality of some ill-defined but narrow class of "tipsters" requiring absolute secrecy. In his testimony, which included numerous examples of the reluctance of sources to cooperate in light of the possibility of public disclosure under the FOIA, Director Webster spoke to the "willingness of human beings to furnish information" to the FBI gen-

[1] The First Circuit has recently also expressly followed the majority rule with respect to the presumption of confidentiality. See *Providence Journal Co.* v. *United States Dep't of the Army*, No. 92-1166 (Dec. 8, 1992), slip op. 26-28.

erally, and he included among the confidential sources needing broader protection "private citizens, businessmen and representatives of municipal and state governments." [2] As a result of such testimony by Director Webster and others over a five-year period (Gov't Br. 29-32), Congress was fully aware when it enacted the 1986 FOIA amendments of the broad range of "confidential sources" protected by Exemption 7(D), which went well beyond those demanding complete anonymity.[3]

Respondent's theory is further refuted by the fact that the 1986 amendments to Exemption 7(D) expressly include state and local law enforcement agencies among the sources that can qualify as "confidential." Such entities are fully aware that any assurances of confidentiality are inherently qualified by legal obligations, such as the requirement under *Brady* v. *Maryland*, 373 U.S. 83 (1963), to release exculpatory materials to the defendant in a criminal prosecution. The same Congress that recognized the confidentiality that typically inheres in communications between local law enforcement agencies and

[2] See *Oversight of the Administration of the Federal Freedom of Information Act: Hearings Before the Subcomm. on Intergovernmental Relations of the Senate Comm. on Governmental Affairs*, 96th Cong., 2d Sess. 460 (1980).

[3] Director Webster and other witnesses stressed the wide range of confidential sources vital to federal law enforcement efforts, describing them as "the single most important tool" and the "mainstay" of law enforcement, and pointed out that they include "private citizens and 'street' informants alike"—sources providing "background information" as well as those relating direct evidence of crimes. See *Freedom of Information Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 861 (1981) (Dir. Webster) [*1981 Hearings*]; *Freedom of Information Reform Act: Hearings on S. 774 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 1st Sess. 57 (1983) (AAG Rose); *id.* at 482 (Dir. Webster); *The Freedom of Information Reform Act: Hearings on S. 774 Before a Subcomm. of the House Comm. on Government Operations*, 98th Cong., 2d Sess. 805 (1984) (DAG Dinkins).



the FBI (see also J.A. 40) could not have intended the crabbed reading of "confidential" that respondent advances here.

Respondent's suggestion (Br. 10, 37 n.21, 46-47) that the mere possibility that information might be disclosed under *Brady* negates the "confidential" status of its source takes his argument to its absurd conclusion. Notwithstanding our showing that Congress has consistently sought to secure effective protection for a wide range of confidential FBI sources (Gov't Br. 24-33), respondent candidly insists (Br. 10, 47) upon an interpretation under which protection would be "impossible" to assure or could, at best, be afforded "only rarely."

2. At the same time that respondent tries to redefine the term "confidential source" in a way that would largely eliminate the protection afforded by Exemption 7(D), he argues (Br. 17) that we have "effectively *defined*" the term to include all sources in a criminal investigation. Respondent fails, however—as the court of appeals occasionally did (see Gov't Br. 22)—to distinguish between issues of definition and issues of proof. The definition of "confide[illegible]ource" is a matter on which there is wide consens[illegible]n which even the court below joined. Both the ordinary meaning of the term and the legislative history of Exemption 7(D) show that it has a broad yet concrete meaning: it applies to any person who reasonably could be found to have furnished information "in confidence," regardless of whether that finding is based on an express assurance or on "circumstances from which such an assurance could reasonably be inferred." Gov't Br. 15-16; Pet. App. 22a (quoting S. Rep. No. 1200, 93d Cong., 2d Sess. 13 (1974)). The substantive standard of confidentiality applies regardless of how it may be met in a particular case. And because any inference or presumption of confidentiality, as so defined, may be rebutted on the facts of a particular case, there is no merit to respondent's notion that

our reading of Exemption 7(D) would sweep all sources within its coverage as a matter of law.

B. 1. The remaining issue is what showing the FBI must make to carry its burden of sustaining the application of Exemption 7(D) to particular information. As we point out in our opening brief (Gov't Br. 22-24), an approach based on objective inferences is especially appropriate in this setting because, under the text of Exemption 7(D), the FBI need not demonstrate that a given record will necessarily reveal a confidential source (or, in a criminal investigation, information furnished by such a source); the text of the Exemption requires only that production of the record "could reasonably be expected" to have that result. Respondent argues (Br. 20-21, 42) that this straightforward analysis represents a "misreading" of the statutory language, but his grammatical arguments are spurious. We have never argued that the words "could reasonably be expected" modify the term "confidential source"; those words clearly modify the word "disclose," and they permit withholding even if there is uncertainty about whether the disclosure of a confidential source (or information provided by such a source) will in fact occur. There is, however, no textual basis for respondent's assertion that this phrase allows for only one type of uncertainty—*i.e.*, when it is known that an individual is a "confidential source" but uncertain whether production of a given document would reveal his identity. The situation presented by this case is likewise covered by a straightforward application of the statutory text: where, as is frequently the case, an FBI record on its face reveals the identity of a source and there is no circumstance that would negate the normal inference of confidentiality, it logically follows that production of that record "could reasonably be expected to disclose the identity of a confidential source."

Respondent also invokes the legislative history of the 1986 FOIA amendments in support of his narrowing construction of the "could reasonably be expected" language,



arguing that Congress was concerned solely with the "mosaic" problem that arises when a knowledgeable requester would be able to ascertain the identity of a source from seemingly innocuous information. See Resp. Br. 37-41. Although that example of the law enforcement concerns engendered by the FOIA was discussed during Congress's consideration of the 1986 amendments, the statute cannot properly be confined to the particular example that was used to illustrate the problem to be addressed. See *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990). Moreover, the application of Exemption 7(D) we urge is fully consonant with an avowed purpose of the 1986 amendments—to ease the FBI's burden in invoking Exemption 7(D). See *Irons*, 880 F.2d at 1452; *Reporters Committee*, 489 U.S. at 756 n.9; see also *id.* at 777 n.22 ("coud reasonably be expected" language gives government "greater flexibility").[4]

2. Even if the Court were to conclude that the phrase "could reasonably be expected" does not in itself provide express textual support for a presumption or inference of confidentiality, it would not follow, as respondent suggests (Br. 14-16), that Exemption 7(D) thereby affirmatively *precludes* use of reasonable presumptions or inferences. As we have shown (Gov't Br. 38-43), this Court

---

[4] Respondent also argues (Br. 40-41) that the history of the 1986 amendments reflects no intent to alter the "definition of 'a confidential source.'" As we have already shown, that argument fails to recognize that while Congress did not alter the meaning of "confidential source" in 1986, it deliberately eased the government's evidentiary burden in establishing confidentiality. See Gov't Br. 22, 32-33. Indeed, the key congressional committee report—to which respondent does not even refer—specifically tied the "could reasonably be expected" language of the amendment to the "burden of proof" borne by law enforcement agencies in invoking Exemption 7. S. Rep. No. 221, 98th Cong., 1st Sess. 23-24 (1983); see *United States Dep't of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749, 778 n.22 (1989) (pointing to Senate Report's discussion of this amendment).

has approved the use of "presumptions" in allocating evidentiary burdens in cases arising under a variety of statutes in which Congress did not expressly so provide.

Furthermore, this Court's prior FOIA decisions make clear that where a generic or "categorical" showing is logically sufficient to establish the applicability of an exemption, the FOIA imposes no requirement of individualized proofs. See Gov't Br. 23-24 & n.17. Respondent's attempts (Br. 41-43) to avoid the teaching of those cases are unavailing. First, his purported distinction between "categorical" and "universal" rules (Br. 41-42) is meaningless, because every "categorical" rule is "universal" within the defined set of circumstances to which it applies. Moreover, the categories of records for which the FBI invoked Exemption 7(D) in this case are, in respondent's words, "well-defined" (Br. 42)—just like the categories of records protected under *Reporters Committee; NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978); and *FTC* v. *Grolier Inc.*, 462 U.S. 19 (1983), on which respondent relies (Br. 41-42). See J.A. 33-41. Second, respondent errs in supposing (Br. 43) that the holding of *Reporters Committee* rested solely on "adjudicative difficulties" unique to "balancing" tests. *Reporters Committee* carefully analyzed the pertinent provisions of the FOIA and concluded that they contain no requirement of individualized proofs under any FOIA exemption, if its applicability can be demonstrated by a categorical showing. 489 U.S. at 778. The Court stressed as well the need for "workable rules" in applying the FOIA's exemptions, not simply to avoid administrative burdens, but also to ensure principled and predictable implementation of the Act. *Id.* at 779. Such considerations are not limited to "balancing" tests; one of the great flaws in any attempt to base the application of Exemption 7(D) on after-the-fact assessments of the circumstances of individual interviews is that it will " 'result in *ad hoc*—and therefore unprincipled—determinations' by the courts." Gov't Br. 37 (quoting *Dow Jones*, 917 F.2d at 577).



3. Respondent's resort to legislative history in an effort to establish that source-by-source showings are required is no more successful. Respondent makes much of the discussion during consideration of the 1974 FOIA amendments of the need for greater specificity in supporting the withholding of law enforcement records. See Resp. Br. 29-32. At that time, however, Congress was dealing with a wholly different level of specificity. Whereas the pre-1974 version of Exemption 7 provided a virtually complete exemption for all law enforcement records, the 1974 amendments imposed the new requirement that an agency invoking Exemption 7 establish that disclosure would result in a specific type of harm, corresponding to one of the new subparts of the exemption. See generally *FBI* v. *Abramson*, 456 U.S. 615, 627-628 (1982). Nothing in the 1974 legislative history indicates that Congress meant to insist that each *instance* of such specific harm be proved separately, and this Court has not read Exemption 7 to impose such a requirement. See *Reporters Committee; Robbins Tire*, 437 U.S. at 223-224.[5]

Respondent's reliance on the 1974 Conference Report's explanation that Exemption 7(D) applies "in circumstances from which such an assurance [of confidentiality] could reasonably be inferred" is particularly puzzling. See Resp. Br. 28-29 (quoting H.R. Conf. Rep. No. 1380, 93d

[5] The passage from a bar association report quoted by two Senators, on which respondent relies (Br. 26-27), reflected the overall change proposed for Exemption 7, distinguishing between generalized concerns about the "disclosure of investigative techniques *in general*" and more well-defined interests such as "the need to preserve the identity of sources of information *in particular cases*." 120 Cong. Rec. 17,035 (1974) (*Source Book II* at 338). That passage says nothing about the type of evidentiary showing that must be made in a particular case. Another snippet of legislative history on which respondent relies—Senator Kennedy's statement disapproving "blanket claim[s] of confidentiality," Resp. Br. 27 (quoting 120 Cong. Rec. 17,019 (1974))—is even further afield, because it involved the requirement that "reasonably segregable" portions of otherwise exempt records be released.

Cong., 2d Sess. 13 (1974) (*Source Book II* at 230)). That passage actually confirms that Congress recognized that an inference of confidentiality would be a proper basis for invoking Exemption 7(D); it says nothing about the showing needed to support such an inference.

Respondent's strained arguments (Br. 29-32) based on the 1974 legislative history regarding FOIA Exemption 1, 5 U.S.C. 552(b)(1), are even further removed from anything relevant to this case. The remarks he quotes concerned *in camera* inspection of classified records and a proposal for altering the standard of *judicial review* under Exemption 1 through use of a "presumption" that Executive classification decisions were correct. Congress's decision not to alter the standard of judicial review under Exemption 1[6] has nothing to do with the sort of evidentiary presumption at issue here, which would be applied by federal agencies and reviewing courts alike. This Court has recognized that the propriety of categorical or presumptive approaches to proof under the FOIA is distinct from the *de novo* standard of judicial review. See *Reporters Committee*, 489 U.S. at 756 n.9. Indeed, respondent concedes (Br. 24 n.11) that *Reporters Committee* held "that the burden of proof requirements of the FOIA do not, by themselves, mandate case-by-case analysis."[7]

[6] Nevertheless, the courts have uniformly recognized, based on further legislative history that respondent does not cite, that they must give "substantial weight" to agency classification decisions in Exemption 1 cases. See, *e.g.*, *Military Audit Project* v. *Casey*, 656 F.2d 724, 738 (D.C. Cir. 1981) (quoting S. Rep. No. 1200, *supra*, at 12); *Krikorian* v. *Department of State*, No. 91-5028 (D.C. Cir. Jan. 29, 1993), slip op. 4.

[7] Respondent's reference (Br. 27 n.14) to congressional oversight of one agency's implementation of FOIA Exemption 4, 5 U.S.C. 552(b)(4), is completely beside the point. The quoted passage concerned the propriety of agency solicitation of express requests for confidentiality, which has nothing to do with the evidentiary issue here. In any event, the passage led to no change in Exemption 4. Furthermore, although the scope of "confidential" commercial information protected by Exemption 4 has been a matter of some dispute, that dispute has centered on court-developed standards based on the underlying policies of Exemption 4, which have no counterpart in the case law under Exemption 7(D). See generally *Critical Mass Energy Project* v. *NRC*, 975 F.2d 871 (D.C. Cir. 1992 (en banc), petition for cert. pending, No. 92-1043.



C. Although nothing in the text, history, or policies of the FOIA imposes the source-by-source proof requirement for which respondent argues, he insists (Br. 21-24, 43-48) that the presumption of confidentiality that the majority of the courts of appeals have recognized is inappropriate. Respondent fails to appreciate the practical necessity of such a presumption in order to give "meaningful reach and application" to Exemption 7(D). See *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 152 (1989).

1. Respondent complains (Br. 22-23) that while some presumptions are "easily rebutted," the presumption of confidentiality under Exemption 7(D) is not. However, the myriad presumptions that the law recognizes vary widely, and the manner in which a particular presumption is applied depends upon the governing substantive law and practicalities of proof. See generally 2 *McCormick on Evidence* §§ 342-344 (4th ed. 1992). The difficulties that a FOIA plaintiff may face in attempting to rebut the presumption of confidentiality (see *Dow Jones*, 917 F.2d at 577) often result from limitations on the information available to *either* party. See Gov't Br. 41 n.34. Furthermore, if an implied assurance of confidentiality indeed *is* the norm, respondent is wrong to suggest that the presumption *should* be "easily rebutted." And the very fact that the presumption is rebuttable makes this rule inherently less stringent than the truly "categorical" rule adopted in *Reporters Committee*.[8]

[8] The availability of *in camera* inspection provides a further safeguard to ensure that law enforcement agencies do not improperly

Respondent also contends (Br. 22-23, 45) that a presumption of confidentiality is inappropriate because it does not work in favor of FOIA requesters, the putative "beneficiaries of this remedial Act." The FOIA, however, is a multifaceted statute that accommodates a number of competing policies. *Abramson*, 456 U.S. at 621; *United States* v. *Weber Aircraft Corp.*, 465 U.S. 792. 803 n.23 (1984). Although the Act's general policy is, of course, to encourage disclosure, that goal is tempered by the policies underlying the exemptions; and "[i]n applying Exemption 7, the Court carefully has examined the effect that disclosure would have on the interest the exemption seeks to protect." *John Doe Agency*, 493 U.S. at 157. The legislative record on which Congress acted in 1966, 1974, and 1986 establishes that the central policy of Exemption 7(D) is to ensure the continued flow of information to the FBI and other law enforcement agencies by affording reliable protection to their confidential sources. See Gov't Br. 24-33. The presumption we urge plainly "is consistent with, and * * * supports" that policy. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988).

2. Respondent denies that "common sense and probability" support a presumption of confidentiality (Resp. Br. 45-46 (quoting *Basic Inc.*, 485 U.S. at 246)), but he fails to answer the abundant indications that confidentiality is indeed the norm. The FBI's evidentiary submission to the district court in this case (which respondent

---

invoke Exemption 7(D). See, *e.g.*, *Hale* v. *United States Dep't of Justice*, 973 F.2d 894, 899-900 (10th Cir. 1992). *In camera* inspection might be appropriate, for example, where a FOIA plaintiff can articulate a ground for rebutting the presumption of confidentiality but claims to lack access to necessary evidence. In this case, the FBI repeatedly offered to allow *in camera* inspection of the entire file, even though respondent never articulated any reason to suggest that the sources providing information to the FBI in the course of the Snow murder investigation did not have the usual expectation of confidentiality. The district court declined that offer. Pet. App. 45a-46a.



did not rebut) establishes that sources "must be assured" confidentiality in order to protect the FBI's investigative capabilities, that the FBI has consistently maintained the confidentiality of source information in criminal investigations, and that there is a "traditional willingness" to assure confidentiality and a "traditional understanding" to that effect as a result. Superneau Decl. ¶¶ 48, 49, 54, 55 (J.A. 37-38, 40-41). In addition, the FBI's practice of preserving confidentiality has been recognized by the courts,[9] which have concluded that "[m]ost people would assume that the information they give to a criminal law enforcement official during a criminal investigation will be kept confidential." *Johnson* v. *United States Dep't of Justice*, 739 F.2d 1514, 1518 (10th Cir. 1984); see *Dow Jones*, 917 F.2d at 577 ("rarely—if ever—will a source not desire" confidentiality). Respondent's contrary insistence (Br. 46) that many "citizen volunteers" are indifferent to confidentiality lacks any evidentiary basis in the record and is contrary to common sense. It also is at odds with repeated congressional testimony by federal law enforcement officials, who have stressed that a public perception that the FBI can and will effectively safeguard confidentiality is crucial to the continued willingness of a wide range of citizens and organizations to provide information. See Gov't Br. 31.

Respondent's further arguments for doubting that sources normally expect confidentiality are insubstantial. His suggestion (Br. 46) that confidentiality is not implicit when sources provide "seemingly unimportant" information ignores the fact that it is frequently difficult to know, in advance, what information will prove important and what adverse consequences may ensue from disclosure of particular information. See Gov't Br. 19

---

[9] See, *e.g.*, *Dow Jones*, 917 F.2d at 577; *Nadler* v. *United States Dep't of Justice*, 955 F.2d 1479, 1484 (11th Cir. 1992); *Londrigan* v. *FBI*, 722 F.2d 840, 843-844 (D.C. Cir. 1983) (quoting 1954 FBI memorandum regarding confidentiality).

n.12.[10] Next, while respondent makes much of the possibility that sources might not expect confidentiality if the person to whom they spoke did not identify himself as an FBI agent (see Resp. Br. 45-46, 48 n.28), standard FBI instructions establish that such identification is routine practice (see Gov't Br. 20 n.14), and the premise that the source is aware of the FBI agent's identity underlies the FBI's entire submission in this case about the assurances of confidentiality that can reasonably be inferred from such encounters. See J.A. 37-41. In those rare instances in which there is reason to believe that a person who provided information was unaware that he was speaking to an FBI agent—*e.g.*, where the agent was operating undercover—the reasoning upon which the FBI relies in this case would not apply.[11]

3. Because an assumption of confidentiality is indeed the norm for FBI sources, respondent's protestations (Br. 43-45) that the FBI *might*, in some cases, be capable of making a more detailed showing of the circumstances of individual sources is irrelevant. In addition, in refusing to acknowledge the difficulty of providing detailed descriptions of long-past interviews, respondent ignores numerous appellate decisions recognizing the "practical difficulty—if not impossibility" of making the sort of showing he envisions. See *Diamond* v. *FBI*, 707 F.2d 75, 78 (2d Cir. 1983), cert. denied, 465 U.S. 1004 (1984);

[10] Respondent's suggestion also ignores the legal principle that the applicability of Exemption 7(D) cannot depend upon the nature of the particular information provided. See *Shaw* v. *FBI*, 749 F.2d 58, 61 (D.C. Cir. 1984).

[11] There is no merit to the court of appeals' suggestion (Pet. App. 25a n.4) that a recitation by the FBI of its practice regarding identification of agents was necessary to support its invocation of Exemption 7(D). See Gov't Reply Br. (certiorari stage) 4. The FBI had no occasion to make such a showing in this case, because respondent never raised the point; it was raised *sua sponte* by the court of appeals. But if such a recitation were deemed necessary, it could be submitted in the event of remand.



Gov't Br. 36 & n.30 (citing additional cases). Even if more detailed information might be available in some cases, Exemption 7(D) can serve its intended purpose of ensuring the continued flow of vital law enforcement information only if its protection is categorical and predictable, and not subject to the vagaries of available proof in future litigation. Gov't Br. 31, 37.[12]

Throughout his brief, respondent avoids any clear statement of what sort of proof *would* be sufficient, in his view, to satisfy the FBI's burden of sustaining its invocation of Exemption 7(D). To the extent he suggests possible means of doing so, however, he reveals both the unmanageability of the resulting judicial inquiry and the improper narrowing of Exemption 7(D)'s scope that would result. For example, respondent refers (Br. 44) to possible evidence of express promises of (or requests for) confidentiality. Congress, however, made clear that express indicia of confidentiality are *not* necessary under Exemption 7(D), and that confidentiality may be "reasonably inferred" from the circumstances. See H.R. Conf. Rep. No. 1380, *supra*, at 13 (*Source Book II* at 230). Protection of the vast majority of the FBI's confidential sources depends upon implied assurances,[13] which are not typically capable of detailed proof after the fact.

[12] For this reason, respondent's observation that the FBI succeeded in making a more detailed showing in *Lame* v. *United States Dep't of Justice*, 767 F.2d 66 (3d Cir. 1985), is of little comfort. That opinion does not indicate the nature of the showing deemed sufficient, which was made by *in camera* declarations. It bears emphasis, moreover, that *Lame* was an anomaly, and that, for more than a decade, the FBI has consistently relied upon the majority rule that has upheld its invocation of Exemption 7(D) based on a presumption of confidentiality. Adoption of the rule of *Lame*, by which the panel below deemed itself bound, would represent a dramatic departure from prevailing practice under Exemption 7(D), would inescapably leave the identities of many existing sources unprotected, and would greatly reduce the Exemption's efficacy in protecting confidential sources generally.

[13] As one court of appeals has recently noted, the FBI has good reason to avoid express discussions of confidentiality with many

Respondent also suggests that the FBI can make a showing of "the time, place and manner of witness interviews." Resp. Br. 44. Apart from the fact that such information is not available for many interviews,[14] respondent fails to explain how it would be used or what the criteria for finding confidentiality would be. A rule calling for *ad hoc* determinations by the courts based on whatever they might read into factors such as the timing or locale of the interview would fail to provide the "concrete, workable standards" needed under the FOIA, *EPA* v. *Mink*, 410 U.S. 73, 79 (1973), and would destroy the ability of Exemption 7(D) to provide the degree of protection that the public requires.

D. A pervasive theme of respondent's brief is that a presumption of confidentiality would "eviscerate" the FOIA with respect to law enforcement agencies, providing a "blanket" exemption that would undo the 1974 FOIA amendments and relieve the FBI and other federal

---

sources, because any such discussion can itself chill full cooperation by the sources. *Nadler*, 955 F.2d at 1486.

[14] See, *e.g.*, *Schmerler* v. *FBI*, 900 F.2d 333, 336 (D.C. Cir. 1990) (50-year-old records); Gov't Br. 36-37 & n.30. Respondent presumably would take the position that the FBI could remedy this problem prospectively by consistently maintaining more detailed descriptions of the circumstances of source interviews. Even if that were feasible as a practical matter, however, it would still subject the FBI's vast store of existing records on confidential sources to disclosure under a standard that could not have been anticipated—and that would destroy public trust in the FBI's ability to assure confidentiality. Cf. 5 U.S.C. 552a(j)(2) (Privacy Act's systemwide exemption for law enforcement information). Had Congress intended to impose such a requirement on law enforcement agencies, it would have done so overtly, as it has done elsewhere. For example, the Privacy Act, which Congress considered contemporaneously with the 1974 FOIA amendments, prospectively limited an exemption for investigatory materials relating to employment and similar background checks to instances of express assurances of confidentiality, while extending the exemption to instances of implied assurances for materials collected before the effective date of the Privacy Act. See 5 U.S.C. 552a(k)(5).



law enforcement agencies of their burden of proof. See Resp. Br. 7-8, 16, 21, 25, 41-42. It is true that continued adherence to the prevailing rule will protect the identities of a wide range of confidential sources, as well as the information they have conveyed. But that is as it should be, because, as the majority of lower courts have recognized, a "robust" application of Exemption 7(D) is crucial to ensuring that "confidential sources are not lost because of retaliation against sources for past disclosure or because of the sources' fear of future disclosure." *Brant Constr. Co.* v. *EPA*, 778 F.2d 1258, 1262 (7th Cir. 1985).

Respondent offers no support for his assertion (Br. 16) that under our position "virtually all of the FBI's files could be withheld," excepting only "newspaper and magazine clippings." FBI investigatory files consist of a wide array of materials, including laboratory reports and other documents regarding physical evidence, as well as correspondence and internal memoranda that may contain little or no information from sources. Any records reflecting actions taken by FBI agents themselves, as opposed to the information they receive from outside sources, is also beyond the scope of Exemption 7(D).[15] This fact shows that the FOIA retains its vitality regarding law enforcement agencies. It also reflects a sound congruence between the operation of that Exemption and the basic policy of the Act, which is to shed public light on the activities of federal agencies themselves, as opposed to those of private citizens or non-federal entities that deal with those agencies. See *Reporters Committee*, 489 U.S. at 772-775.

---

[15] The proportion of materials that will fall into this category will, of course, vary among investigatory files. Although respondent complains (Br. 4) about the proportion of information withheld in this case, much information was withheld because it was received from local law enforcement agencies—a result to be expected where, as here, the subject of the investigation was a violation of state law.

Respondent's dire assessment of the impact of the presumption of confidentiality on public disclosure of the FBI's activities also is refuted by the history of substantial disclosures since the 1974 FOIA amendments were enacted. Although the FBI (with the approval of most courts) has consistently applied the approach to Exemption 7(D) that we urge here, reported decisions reflect numerous instances in which tens or even hundreds of thousands of pages of records have been released under the FOIA, providing extensive information to the public about the FBI's operations.[16] These and other cases have recognized the significance of the information released and its value in enabling the public to understand the workings of the FBI.[17] The continued importance of the

[16] See, *e.g.*, *Weisberg* v. *United States Dep't of Justice*, 848 F.2d 1265, 1266 (D.C. Cir. 1988) (release of over 60,000 documents regarding the investigation of the assassination of Dr. Martin Luther King, Jr.); *Weisberg* v. *Webster*, 749 F.2d 864, 866 (D.C. Cir. 1984) (release of over 200,000 pages of documents concerning the assassinations of Dr. King and President Kennedy); *Meeropol* v. *Meese*, 790 F.2d 942, 946 (D.C. Cir. 1986) (release of 200,000 pages of records regarding the investigation and prosecution of Julius and Ethel Rosenberg). As the latter court noted, the FBI devotes an enormous amount of personnel and other resources to the processing of FOIA requests (see 790 F.2d at 956), an endeavor that would be unnecessary if the FBI enjoyed the sort of "blanket" exemption that respondent imagines to exist under our reading of Exemption 7(D).

[17] See *Silets* v. *United States Dep't of Justice*, 945 F.2d 227, 230 (7th Cir. 1991) (en banc) ("redactions in no way hamper the public's understanding of FBI surveillance of Jimmy Hoffa"), cert. denied, 112 S. Ct. 2991 (1992); *Donovan* v. *FBI*, 806 F.2d 55, 57 (2d Cir. 1986) (FBI releases "most" of file concerning murder of American churchwomen in El Salvador).

Furthermore, the repeated grant of fee waivers for FBI FOIA requests—pursuant to 5 U.S.C. 552(a)(4)(A)(iii), under which the test is whether the release in question "is likely to contribute significantly to public understanding of the operations or activities of the government"—shows that meaningful releases are indeed taking place, notwithstanding the FBI's maintenance of source confidentiality under Exemption 7(D). See, *e.g.*, *Weisberg* v. *United*



FOIA as a source for critical assessments of the FBI's work is also apparent in reviews of a number of recent books, which have specifically credited FOIA releases as key sources for those works.[18]

In short, respondent errs in arguing that the presumption of confidentiality that most of the lower courts have recognized will result in the "evisceration" of the FOIA. At the same time, acceptance of respondent's view of Exemption 7(D) *would* eviscerate that provision by limiting its application to assurances of absolute secrecy, by imposing forbidding evidentiary burdens, and by engendering unpredictable, *ad hoc* judicial decision-making that is the antithesis of the "concrete, workable standards" that this Court has recognized are essential for the effectuation of the FOIA's policies. See *EPA* v. *Mink*, 410 U.S. at 79.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed with respect to FOIA Exemption 7(D).

Respectfully submitted.

WILLIAM C. BRYSON
*Acting Solicitor General*

FEBRUARY 1993

*States Dep't of Justice*, 848 F.2d at 1269; *Summers* v. *United States Dep't of Justice*, 925 F.2d 450, 451 (D.C. Cir. 1991). *Irons* v. *FBI*, 811 F.2d 681, 682 (1st Cir. 1987); *Rosenfeld* v. *United States*, 859 F.2d 717, 719 (9th Cir. 1988).

[18] See Herbert Mitgang, *When Academics Doubled as Intelligence Agents*, N.Y. Times, July 29, 1992, at C18 (reviewing S. Diamond, *Compromised Campus: The Collaboration of Universities with the Intelligence Community, 1945-1955* (1992)); Frank Donner, *Keeping Very Close Tabs on America's Writers*, N.Y. Times, Mar. 16, 1992, at C15 (review of N. Robins, *Alien Ink: The FBI's War on Freedom of Expression* (1992)); Herbert Mitgang, *Investigating the Chief Investigator*, N.Y. Times, Oct. 16, 1991, at C21 (review of C. Gentry, *J. Edgar Hoover: The Man and the Secrets* (1991), and A. Theoharis, ed., *From the Secret Files of J. Edgar Hoover* (1991)).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1993 342479 60172